

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 416

THE UNITED STATES OF AMERICA,
APPELLANT,

VS.

WALLACE & TIERNAN COMPANY, INC., *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

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In District Court of the United States
District of Rhode Island

Present: Hon. John P. Hartigan,

District Judge.

Civil Action No. 705.

UNITED STATES OF AMERICA,

Plaintiff,

v.

WALLACE & TIERNAN COMPANY, INC., WALLACE & TIERNAN
PRODUCTS, INC., WALLACE & TIERNAN SALES CORPORATION,
BUILDERS IRON FOUNDRY, NOVADEL-AGENE CORPORATION,
INDUSTRIAL APPLIANCE CORPORATION, MARTIN F. TIERNAN,
WILLIAM J. ORCHARD, HENRY S. CHAFEE, GERALD D. PEET,
HAROLD S. HUTTON, VINCENT PISANI, and CORNELIUS F.
SCHENCK,

Defendants.

Docket Entries

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- | | | U. S. |
|------|----|--|
| Nov. | 18 | Complaint filed. 15.00 |
| | | Summons issued for each defendant, returnable within twenty days of service thereof. |
| | 19 | Continued to next term. |
| | 26 | Appearance Chauncey E. Wheeler, Esq. and S. Everett Wilkins, Jr., Esq. for defendants Builders Iron Foundry and Henry S. Chafee filed. |
| | 27 | Summons returned duly served and filed as to Builders Iron Foundry and Henry S. Chafee. |
| Dec. | 2 | Stipulation filed fixing time for service of answers by Builders Iron Foundry and Henry S. Chafee on or before February 15, 1947. |
| | 6 | Summons returned duly served and filed <i>re</i> : the following defendants: William J. Orchard—Industrial Appliance Corporation—Vincent Pisani—Gerald D. Peet—Harold S. Hutton—Novadel-Agene Corporation—Martin F. Tiernan. |
| | 7 | Summons returned duly served and filed <i>re</i> : the defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products Co., Wallace & Tiernan Sales Corp. and Cornelius F. Schenck. |
| | 9 | Stipulation filed and approved allowing defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corp., Novadel-Agene Corporation, Industrial Appliance Corporation, Martin F. Tiernan, |

William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck sixty days in addition to the twenty days provided for by Rule 12 in which to answer, etc., or until February 10, 1947.

10. Appearances of William H. Edwards and Gerald W. Harrington, Esquires of Edwards & Angell filed for the following defendants: Wallace & Tiernan Sales Corp., Wallace & Tiernan Products, Inc.,—Wallace & Tiernan Company, Inc.,—Cornelius F. Schenck—Vincent Pisani—Harold S. Hutton—Gerald D. Peet—William J. Orchard—Martin F. Tiernan. Appearance Edward T. Hogan and Laurence J. Hogan, Esquires, Hogan & Hogan, for defendants Novadel-Agene Corp. and Industrial Appliance Corporation filed.

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Jan. 27 Stipulation approved and filed extending time for answering or presenting other defenses, etc., to March 12, 1947.

Feb. 11 Stipulation approved and filed extending time for answering or presenting other defenses, etc., to April 15, 1947.

March 27 Stipulation approved and filed for extension of time for filing answer or other pleadings to May 14, 1947 (by Wallace & Tiernan Co., Inc., et al., Novadel-Agene Corp., Industrial Appliance Corp., Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius Schenck).

April 1 Stipulation approved and filed for extension of time for filing answers by Builders Iron Foundry and Henry S. Chafee to May 14, 1947.

May 14 Answer of defendants, Builders Iron Foundry and Henry S. Chafee filed.

Motions to dismiss for lack of jurisdiction over the person and also for improper venue filed together with supporting affidavit by Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc.

Wallace & Tiernan Sales Corporation
Novadel-Agene Corporation

Industrial Appliance Corporation

Martin F. Tiernan, William J. Orchard,
Gerald D. Peet, Harold S. Hutton, Vincent
Pisani, Cornelius F. Schenck.

Motion of defendants, Novadel-Agene Corporation and Industrial Appliance Corporation for Bills of Particulars filed.

Motion of defendants, Wallace & Tiernan Company, Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation for Bill of Particulars filed.

Motion of defendant, Martin F. Tiernan, for Bill of Particulars filed.

Motion of defendant, William J. Orchard, for Bill of Particulars filed.

Motion of defendant, Gerald D. Peet, for Bill of Particulars filed.

Motion of defendant, Harold S. Hutton for Bill of Particulars filed.

Motion of defendant, Cornelius P. Schenek, for Bill of Particulars filed.

Motion of defendant, Vincent Pisani, for Bill of Particulars filed.

Affidavit of service of motions to dismiss for lack of jurisdiction, etc. and of motions for Bill of Particulars filed by John V. Kean of Edwards and Angell, Esquires.

May 26 Continued to next term.

June 2 Called for hearing on above Motions and con'd to July 21, 1947.

19 Hearing date assigned on Motions orally ordered extended two weeks (all motions, etc. to be heard Sept. 8, 1947).

July 23 Application for order directing issuance of summons to all defendants residing outside this District filed and order entered and filed accordingly.

4 Sumons issued to each defendant with the exception of Henry S. Chafee and Builders Iron Foundry and transmitted to U. S. Attorney in this District.

29 Summons returned duly served and filed as to each Deft. with the exception of Henry S. Chafee and Builders Iron Foundry.

31 Motions to rescind order entered July 23, 1947, etc. filed by Wallace & Tiernan Company, Inc. *et al.* (defendants represented by Edwards & Angell, Esqs. and Hogan & Hogan, Esqs.). For hearing on Sept. 8, 1947.

- Aug. 14 Stipulation entered and filed.
 Sept. 8 Motions to rescind order entered July 23, 1947.
 Motions to dismiss for lack of jurisdiction over
 the person and also for improper venue and
 Motions for bills of particulars argued by
 counsel and taken under advisement by the
 Court. Briefs and reply briefs filed with the
 Judge.
 Oct. 7 Court Reporter's transcript on motions argued
 September 8, 1947 filed.
 Nov. 17 Continued to next term.

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- April 14 Pltff's Motion To Vacate Order On Motion For
 Return Of Photostat Copies Of Documents to-
 gether with Affidavit of Alfred Karsted, Esq.
 in Support of Motion To Vacate Order On Mo-
 tion For Return Of Photostat Copies Of Docu-
 ments filed.
 Pltff's Motion For Production of Documents
 Under Rule 34 together with Affidavit of Alfred
 Karsted in Support of Motion For Production of
 Documents Under Rule 34 and Affidavit of
 Chalmers Hamill in Support of Motion For
 Production of Documents Under Rule 34 and
 Motion To Vacate Order On Motion For Return
 of Photostat Copies of Documents filed. Ap-
 pendix To Motion For Production filed.
 16 Opinion filed denying Pltffs' Motions to Dismiss
 complaint. (Copies given to George F. Troy,
 Esq. U. S. Attorney, William H. Edwards, Esq.
 and Edward T. Hogan, Esq.) Opinion filed deny-
 ing Pltffs' Motions for Bills of Particulars
 (Copies given to George F. Troy, Esq., U. S.
 Attorney, William H. Edwards, Esq. and Ed-
 ward T. Hogan, Esq.)
 20 Case called for hearing and Mr. Kelleher for the
 Govt. presented Order denying Defts' Motion
 for Bills of Particular and the said Order was
 entered and filed. Mr. Kelleher also presented
 Order denying Defts' Motion to Dismiss the
 Complaint for Lack of Jurisdiction and the said
 Order was entered and filed.
 5 22 Motion for production of photostatic copies of
 documents surrendered by plaintiff filed by
 plaintiff (for hearing May 3, 1948).

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30. Answer of the defendants: Novadel-Agene Corporation and Industrial Appliance Corporation filed.

Answer of the defendants, Wallace & Tiernan Company, Inc., Wallace & Tiernan Products Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck filed.

Affidavit filed in opposition to the motion for production of documents under Rule 34; and in reply to affidavit of Chalmers Hamill, Verified April 10, 1948.

Affidavit of William H. Edwards filed in opposition to three motions (specified) filed herein by plaintiff (Exhibit N attached 5-3-48).

- May 3 Case called for hearing on motion for production of photostatic copies of documents surrendered by plaintiff, on motion to vacate order for return of photostatic documents and on motion for production of documents under Rule 34 —fully heard and held under advisement—memo to be submitted within ten days.

- 18 Two Civil Subpoenas *Duces Tecum* of United States of America returned duly served and filed. After hearing in chambers and by agreement of counsel and by approval of the Court the Court assigned Motion by Builders Iron Foundry To Quash Subpoenas *Duces Tecum* and Motion By Proportioneers, Inc., to Quash Subpoena *Duces Tecum* to be heard on Monday, May 24, 1948 at 11 o'clock A. M. Said Motions filed.

- 19 Civil Subpoena *Duces Tecum* of United States of America returned duly served and filed. After hearing in chambers and by agreement of counsel and by approval of the Court the Court assigned Motion by Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation and Industrial Appliance Corporation To Extend, Without Prejudice, Date for Compliance With Subpoenas *Duces Tecum*, Or In The Alternative, To Quash Such Subpoenas to be heard on Monday, May 24, 1948 at 11 o'clock A. M. Said motion filed.

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24 Deft., Hellige, Inc.; Motion To Vacate and Quash Civil Subpoena *Duces Tecum* filed. Case called for hearing on the several Defts' Motions to Quash Civil Subpoena. The Court denied the three pending motions that were argued on May 3, 1948.

24 The Court granted all the Defts' Motions to Quash Civil Subpoena.

The case was ordered marked "Ready" on the call of the May Term Calendar tomorrow, May 25, 1948 and assigned for hearing on Wednesday, June 2, 1948 at 2:00 P. M.

Appearance of Chauncey E. Wheeler, Esq. and S. Everett Wilkins, Jr., Esq. for Proportioneers, Inc. filed.

Affidavit of S. Everett Wilkins, Jr. in behalf of Builders Iron Foundry and Proportioneers, Inc. filed. Special Appearance of Harold E. Staples, Esq. in behalf of Fairbanks, Morse & Co. together with its Motion to Extend, Without Prejudice, Date for Compliance with Subpoena *Duces Tecum*, or, in the Alternative, to Quash Such Subpoena filed.

24 Continued to next term.

25 Transcript of Hearing On Motions To Quash Subpoena *Duces Tecum* filed.

26 Opinion denying Pltffs' Motion To Vacate Order On Motion For Return of Photostat Copies of Documents, Motion For Production Of Documents Under Rule 34 and Motion For Production Of Photostatic Copies Of Documents Surrendered By Pltff. filed April 22, 1948. filed. (Copies given to George F. Troy, Esq. and William H. Edwards, Esq.).

27 Civil Subpoena *Duces Tecum* of United States of America returned duly served and filed.

June 1 Order quashing subpoenas for production of documents served on Builders Iron Foundry and Proportioneers, Inc. entered and filed. Order quashing subpoena for production of documents served on Proportioneers, Inc. entered and filed. Order on "Motion For Production of Photostatic Copies of Documents Surrendered by Plaintiff" Denying said motion entered and filed. Order on

"Motion for Production of Documents Under Rule 34" Denying said motion entered and filed. Order on "Motion To Vacate Order on Motion For Return of Photostat Copies of Documents" Denying said motion entered and filed. Order on "Motion To Extend, Without Prejudice, Date For Compliance with Subpoenas *Duces Tecum*, Or. in the Alternative; To Quash Such Subpoenas" that subpoenas *duces tecum* referred to in said motion are quashed and vacated, entered and filed.

2 Case called ready. Pltff. moved for vacating orders entered as of June 1, 1948. Court denied the motion. (Motion applied also to Builders Iron Foundry Hellige, Inc.) Court denied motion, 1 Pltff's Witness sworn. Pltff. filed Affidavit of Grant W. Kelleher, Esquire and after objections by Defts. the Court allowed the filing of the Affidavit. Court allowed two weeks to submit memoranda (June 18th).

7 Transcript of hearing on June 2, 1948 filed.

11 Order on motion of Fairbanks, Morse & Co. to extend without prejudice, date for compliance with subpoena *duces tecum*, or, in the alternative, to quash such subpoena, quashing and vacating such subpoena *duces tecum* entered and filed.

Aug. 6 OPINION filed.

JUDGMENT entered dismissing the action without prejudice and the Government's "request" for judgment and relief prayed for in the complaint is denied.

27 Notice that a proposed Judgment will be submitted to the Court on September 3, 1948 filed.

Sept. 3 Case called for hearing in chambers on the entry of proposed judgment and there being no objection the Court entered JUDGMENT that Ordered, Adjudged and Decreed: That the Government's "Request" for Judgment and relief prayed for in the complaint is denied and the action is dismissed without prejudice. Said Judgment filed.

Oct. 4 Petitioner For Appeal filed by the United States of America together with Assignment of Errors and Prayer for Reversal. Order Allowing Appeal entered and filed. Citation entered and

filed. Statement as to Jurisdiction filed. Statement Calling Attention to the Provisions of Supreme Court Rule 12(3) filed. Proof of Service filed. Praecipe filed.

13 Praecipe filed by Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani, Cornelius F. Schenck, Novadel Agene Corporation and Industrial Appliance Corporation, also Builders Iron Foundry and Henry S. Chafee.

14 Appearance Matthew W. Goring, Esq. for defendants Builders Iron Foundry and Henry S. Chafee filed Second and Additional Praecipe filed by Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani, Cornelius F. Schenck, Novadel Agene Corporation, Industrial Appliance Corporation, Builders Iron Foundry and Henry S. Chafee.

8 18 Stipulation that the time to file a statement against the jurisdiction of the Supreme Court of the United States and to combine therewith a motion to dismiss and/or to affirm, etc., is extended until and including November 4, 1948.

Nov. 4 Statement Making Against Jurisdiction Of The Supreme Court Of The United States And Motion By Defendants (Appellees) To Dismiss Attempted Appeal filed.

Nov. 10 Plaintiff's letter waiving the inclusion of items 12, 15, 16, 17, 20 and 21 designated in the Government's Praecipe filed.

In United States District Court,

Complaint—Filed Nov. 18, 1946.

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the defendants above named and complains and alleges upon information and belief as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the above named defendants under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (15 U. S. C. § 4, commonly known as the Sherman Act, in order to prevent further violations by them, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of said Act (15 U. S. C. §§ 1 and 2).

2. The unlawful combination and conspiracy and attempt to monopolize and monopolization hereinafter alleged have operated, been carried out and are now operating and being carried out in part within the District of Rhode Island. The defendants have performed and are performing within the District of Rhode Island many of the illegal acts hereinafter charged. Defendant Builders Iron Foundry maintains offices, transacts business and inhabits the District of Rhode Island.

II. DESCRIPTION OF DEFENDANTS

3. Each of the following named defendants is a corporation organized and existing under the laws of the state and has its principal place of business as shown below:

Name of Corporation	State of Incorporation	Location of Principal Office
Wallace & Tiernan Company, Inc. (hereinafter referred to as W&T)	New York	Belleville, New Jersey
Wallace & Tiernan Products, Inc. (hereinafter referred to as W&T Products)	New Jersey	Belleville, New Jersey
Wallace & Tiernan Sales Corporation (hereinafter referred to as W&T Sales)	New Jersey	Belleville, New Jersey
Builders Iron Foundry (hereinafter referred to as Builders)	Rhode Island	Providence, Rhode Island
Novadel-Agenc Corporation (hereinafter referred to as Novadel)	Delaware	Belleville, New Jersey
Industrial Appliance Corporation (hereinafter referred to as Industrial)	Delaware	Belleville, New Jersey

W&T is engaged principally in the manufacture, sale and servicing of chlorinating equipment.

W&T Products is engaged principally in the sale and distribution of chlorinating equipment for use in industrial

plants and for the practice of the "Deeco" process for the control of decay in raw foods, citrus fruits and the like.

W&T Sales is engaged principally in selling the products and services of W&T, W&T Products, Novadel and Industrial.

11 Builders is engaged in part in the manufacture and distribution of hypochlorinators.

Novadel is engaged principally in supplying materials and services for the ageing, bleaching and enrichment of flour.

Industrial is engaged principally in the manufacture and sale of "Beta Chlora", a chlorine compound used for ageing flour, together with equipment for the application of "Beta Chlora".

4. Defendant Martin F. Tiernan, and one Charles F. Wallace, own or control 75% or more of the capital stock of defendants W&T and W&T Products. Defendants William J. Orchard and Gerald D. Peet own 70% of the capital stock of defendant W&T Sales. Defendant W&T controls defendant Novadel and owns 40% of its voting stock. Defendant Novadel owns all of the capital stock of defendant Industrial.

5. Each of the individual defendants whose name and address is set forth hereunder is associated with or employed by one or more of the corporate defendants and holds the official title or position as shown below. Each of these individual defendants, during some or all of the period of time covered by this complaint, has been and now is actively engaged in the management and direction and control of affairs, policies and acts of the respective corporations with which he is associated and has authorized, ordered or done the illegal acts complained of hereinafter and is now authorizing, ordering or doing the current illegal acts herein alleged.

Name	Address	Title or Position	Defendant Corporation With Which Associated
Martin F. Tiernan	Belleville, New Jersey	President, Treasurer and Director	W&T, W&T Products.
William J. Orchard	Belleville, New Jersey	General Manager	W&T Sales, Novadel and Industrial.
		President, Director Treasurer, Secretary and Director	W&T Products. W&T Sales.
		Vice-President and Treasurer	Novadel and Industrial.

Defendant Corporation With Which Associated

<i>Name</i>	<i>Address</i>	<i>Title or Position</i>	<i>Associated</i>
Henry F. Chafar	Providence, Rhode Island	President, Treasurer and Director	Builders
Gerald D. Peet	Belleville, New Jersey	Chief Engineer	W&T, W&T Products, W&T Sales, Novadel, and Industrial
		Treasurer, Secretary and Director	W&T Products
		President/Director	W&T Sales
Harold S. Hutton	Belleville, New Jersey	Sales Manager	W&T, W&T Products, W&T Sales, Novadel, and Industrial
Vincent Pisani	Belleville, New Jersey	Manager, Sanitary Sales	W&T, W&T Products and W&T Sales
Cornelius F. Schneek	Belleville, New Jersey	Director of Sales Engineering	W&T, W&T Products and W&T Sales

Each of the above named individual defendants will be referred to hereinafter by his last name.

III. NATURE OF TRADE AND COMMERCE INVOLVED

6. Chlorinating equipment consists of apparatus which utilizes and dispenses chlorine. Chlorine may be applied in several different forms. (a) as a gas, fed from cylinders or drums in which the gas is stored under pressure; (b) as a chemical compound, called hypochlorite, fed in solution from a pot or tank; or (c) as a dry chemical, fed from a hopper.

7. Chlorinating equipment is primarily of two different types dependent upon the form in which chlorine is to be applied. Gas chlorinating equipment is designed to utilize chlorine gas, either alone or mixed with other gases. The hypochlorinator is designed to utilize chlorine in the form of hypochlorite.

8. Chlorinating equipment is used primarily for the following purposes: (1) the treatment of water for consumption and use by human being, including use in swimming pools; (2) the treatment of sewage; (3) the ageing and bleaching of wheat flour and other cereal products; (4) the prevention of bacterial spoilage or raw foods; (5) in industrial plants for slime control, water purification, bleaching of both paper and textiles, and sterilization.

9. Defendant W&T manufacturers chlorinating equipment at its plants located at Belleville, New Jersey, and

sells and ships said equipment directly, or through defendants W&T Products, W&T Sales and Novadel, in interstate commerce to purchasers in other States of the United States, including the State of Rhode Island.

10. Gas chlorinating equipment is purchased and used by the Federal Government and by state, municipal and other local governments primarily for use in the purification of water and sewage. Except for some procurement contracts during wartime, purchases by governmental agencies of chlorinating equipment are made after soliciting public bids and are usually based on specifications issued by government purchasing agents. More than 90% of all gas chlorinating equipment sold or supplied in the United States for the purpose of purification of water and sewage is manufactured by defendant W&T and sold by defendants W&T, W&T Products and W&T Sales.

11. Many sales of gas chlorinating equipment are made in connection with contracts for the installation of water purification systems. In these instances, only large filter and construction companies and general contractors are qualified to undertake the entire project, and necessarily become purchasers of chlorinating equipment therefor.

12. Gas chlorinating equipment is used by flour companies throughout the United States in the artificial ageing and bleaching of wheat flour. All gas chlorinating equipment used in the United States for ageing and bleaching of flour is supplied to the millers by defendants Novadel, W&T, W&T Products and W&T Sales. Defendant W&T manufacturers all gas chlorinating equipment so supplied.

14 13. Gas chlorinating equipment is used in the raw food industry to control the decay of food. All gas chlorinating equipment used in the United States for this purpose is supplied to the raw food industry by defendants W&T, W&T Products and W&T Sales. Defendant W&T manufacturers all gas chlorinating equipment so supplied.

14. Gas chlorinating equipment is employed by paper and textile mills and by laundries to utilize chlorine as a bleach. It is also used in various industrial plants for the purpose of sterilization and of disliming boilers, condensers and other water equipment. More than 95% of gas chlorinating equipment used in the United States for industrial purposes is supplied by defendants W&T, W&T Products and W&T Sales. Defendant W&T manufacturers all gas chlorinating equipment so supplied.

15. At all times since 1917 more than 85% of the annual dollar value of all chlorinating equipment sold in the United States has consisted of gas chlorinating equipment.

16. More than 95% of all gas chlorinating equipment sold or supplied in the United States for all purposes is manufactured by defendant W&T and sold by defendants W&T, W&T Products, W&T Sales and Novadel. The only other manufacturers of gas chlorinating equipment in the United States are Everson Manufacturing Company of Chicago, Illinois, and Chemical Equipment Company of Los Angeles, California.

17. Hypochlorinators are used for the treatment of relatively small amounts of water or sewage and to a limited extent compete with gas chlorinating equipment. Hypochlorinators are purchased primarily by the Federal Government and by state, municipal and other local governments in the same manner as is gas chlorinating equipment. Hypochlorinators are also purchased extensively by private concerns and individuals for the purification of water and sewage and for use in swimming pools.

18. Defendant Builders, at its plant in Providence, Rhode Island, is engaged in the production of water and sewage works equipment and control devices, including telemetering equipment and hypochlorinators. Proportioners, Inc. (hereinafter referred to as Props) is a corporation, 70% of the stock of which is owned by defendant Builders, organized and existing under the laws of the State of Rhode Island. Both defendant Builders and its subsidiary, Props, sell chlorinating equipment manufactured by defendant Builders in interstate commerce to purchasers in States of the United States other than the State of Rhode Island. More than 50% of all hypochlorinators manufactured and sold in the United States are manufactured and sold by defendant Builders and by Props. More than 25% of the hypochlorinators manufactured and sold in the United States are manufactured and sold by defendants W&T and W&T Sales.

19. The total sales of chlorinating equipment for use in the sanitary field only by defendant, W&T, W&T Sales and W&T Products for the year 1944 were in excess of \$14,000,000. The total sales of chlorinating equipment by defendant Builders and by Props in the year 1944 were in excess of \$390,000. The total sales of all other manufac-

turers of chlorinating equipment in the United States for all purposes for the year 1944 were less than \$450,000.

16 20. Fairbanks, Morse & Company (sometimes hereinafter referred to as Fairbanks) is a corporation engaged in part in the manufacture at its plants in St. Johnsbury, Vermont, Moline, Illinois, and elsewhere, of weighing equipment, including platform scales used for the purpose of weighing and recording weights of cylinders filled with liquid chlorine. Fairbanks ships such weighing equipment from its plants in Vermont and Illinois in interstate commerce to purchasers in other States in the United States including the State of Rhode Island. A platform scale is essential in the use of gas chlorinating equipment to indicate the amount of chlorine on hand at any particular time and to enable the calculation of the rate of consumption thereof. From 1931 to the date of the filing of this complaint in excess of 75% of the specifications issued in connection with the purchase of gas chlorinating equipment for the chlorination of water and sewage have required the furnishing of said platform scales used for said purpose.

21. Hellige, Inc. (sometimes hereinafter referred to as Hellige) is a corporation engaged in part in the manufacture of chlorine comparators. It manufactures said equipment at its plant in Long Island City, New York, and sells and ships said equipment in interstate commerce to purchasers in other States of the United States, including the State of Rhode Island. A comparator is essential in the use of chlorinating equipment and is a device for determining the amount of chlorine present in a liquid, and the hydrogen ion concentration of the liquid (commonly designated as the "pH"). From 1931 to the date of the filing of this complaint, more than 75% of the specifications issued in connection with the purchase of chlorinating equipment for the chlorination of water and sewage have required the furnishing of a Hellige comparator.

17 22. Schutte & Koerting Company (hereinafter referred to as Schutte-Koerting) is a corporation engaged in part in the manufacture of rotameters. It manufactures said equipment at its plant in Philadelphia, Pennsylvania, and sells and ships said equipment in interstate commerce to purchasers in States of the United States other than the State of Pennsylvania. A meter to indicate the rate of flow of chlorine gas is essential to the manufacture and operation of gas chlorinating equipment. A rotameter is a type of meter which is used on certain gas chlorinating

equipment manufactured by others than defendants which competes with the gas chlorinating equipment manufactured by defendant W&T.

IV. THE COMBINATION AND CONSPIRACY TO RESTRAIN TRADE AND TO MONOPOLIZE AND THE ATTEMPT TO MONOPOLIZE AND MONOPOLIZATION

23. Beginning in or about the year 1917 and continuing at all times thereafter up to and including the date of the filing of this complaint (1) defendants W&T, Tiernan and Builders, and others have been engaged in a combination and conspiracy to restrain and to monopolize the aforementioned trade and commerce among the several States in chlorinating equipment in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (15 U. S. C. §§ 1 and 18 - 2), commonly known as the Sherman Act; and (2) defendants W&T, Tiernan and others have attempted to monopolize and have monopolized the aforesaid trade and commerce among the several States in gas chlorinating equipment, in violation of Section 2 of said Act. After 1917, at various times, and continuing at all times thereafter up to the date of the filing of this complaint (a) each of the other defendants named herein joined and engaged in said combination and conspiracy in restraint of trade and to monopolize and (b) defendants W&T Products, W&T Sales, Novadel, Industrial, Orchard, Peet, Hutton, Pisani and Schenck, with the aid of defendants Chafee and Builders, joined in said attempt to monopolize and said monopolization. Defendants threaten to continue said offenses and will continue them, unless the relief prayed for in this complaint is granted.

24. Said combination and conspiracy, attempt to monopolize and monopolization have consisted of and now consist of, and have been carried out by and are now being carried out by, a continuing agreement and concert of action among the defendants, the substantial terms of which have been that the defendants exclude others from the manufacture and distribution of chlorinating equipment and eliminate competition among themselves in the manufacture and distribution of chlorinating equipment by:

(a) Acquiring by purchase, from persons other than their own employees, patents and exclusive rights under patents, covering inventions relating to chlorinating equipment;

(b) Institution and threatening to institute suits for alleged infringement of said patents;

(c) Inducing competitors to agree not to engage in the manufacture and distribution of chlorinating equipment;

(d) Acquiring the capital stock or business assets of competitors;

(e) Refusing to furnish supplies, including flour ageing and bleaching agents, and services used in connection with chlorinating equipment, except on the condition that the chlorinating equipment be obtained from the defendants;

19 (f) Inducing others not to sell various parts, devices and appliances required for the manufacture, sale or operation of chlorinating equipment to anyone save the defendants;

(g) Dividing the field for distribution of gas chlorinating equipment by agreeing that certain of the defendants would not manufacture or sell chlorinating equipment having a capacity in excess of 1,500,000 gallons of water per day;

(h) Entering into agreements with large filter and construction companies and general contractors of the type referred to in paragraph 11 of this complaint under the terms of which said companies and contractors agree to distribute only defendants' chlorinating equipment;

(i) Entering into agreements with the companies and contractors referred to in subparagraph (h) above, fixing the prices, terms and conditions upon which said companies and contractors are required to offer for resale chlorinating equipment manufactured by defendants;

(j) Inducing sanitary engineers, consulting engineers, contractors and others, employed by purchasers (including federal, state and local government agencies) for the purpose of preparing specifications for chlorinating equipment and determining whether individual bids comply with such specifications, to join and engage in said combination and conspiracy and to aid in said attempt to monopolize and said monopolization by

(i) causing invitations to bid for contracts to be issued only to defendants;

(ii) preparing for issuance plans and specifications which restrain others from bidding;

(iii) preparing plans and specifications for issuance which disqualify or discourage all bidders except defendants;

(iv) causing the rejection of bids which offer for sale chlorinating equipment not manufactured by defendants; and

(v) causing the rejection of all bids and the issuance of new invitations to bid for the purpose of enabling the defendants to underbid the low bidder.

20 (k) Using defendants' position in the manufacture and distribution of chlorinating equipment to have or attempt to have,

(i) invitations to bid for contracts for said equipment issued only to defendants;

(ii) plans and specifications prepared and issued for said equipment that restrains others from bidding;

(iii) plans and specifications issued which disqualify or discourage all bidders except the defendants;

(iv) all bids rejected and new invitations to bid issued for the purpose of enabling the defendants or any one of them to underbid the low bidder.

(1) Cutting prices on chlorinating equipment, with the intention and purpose of eliminating competition;

(m) Circulating false rumors and unfair reports derogatory to other manufacturers of chlorinating equipment;

(n) Spying upon other manufacturers of chlorinating equipment and thereby obtaining confidential information from their files;

(o) Inducing the contractors and companies referred to in paragraph H of this complaint to submit complementary or dummy bids in ostensible but not intended competition with bids submitted by one or more of the defendants, in order to provide color of compliance with laws or regulations requiring competitive bidding;

(p) Furnishing chlorinating equipment to prospective purchasers without cost for the purpose of preventing the sale of competitive chlorinating equipment and driving competitors out of business.

25. During the period of time covered by this complaint and for the purpose of accomplishing the objectives of said combination and conspiracy, attempt to monopolize and monopolization, the defendants, by concerted action, have done the things, which as hereinbefore alleged, they com-

21 bined, conspired and agreed to do, including the acts and things described in the following paragraphs.

A. ACQUISITION OF PATENTS AND COMPETITORS SERVING THE SANITARY FIELD

26. On or about November 20, 1917, defendant W&T acquired from Electro Bleaching Gas Company (hereinafter sometimes referred to as Electro), then in competition with W&T in the manufacture and sale of chlorinating equipment (a) an exclusive license to use and sell under the Ornstein patents Nos. 1,142,361 and 1,233,371 covering inventions relating to chlorinating equipment, (b) the chlorinating equipment business of Electro, including all manufacturing and sales data pertaining thereto, (c) an agreement by Electro and its officers and directors to refrain from engaging thereafter in the chlorinating equipment business, and (d) an assignment of Electro's exclusive license from Builders under the Gregory patents Nos. 868,776 and 857,343. Defendant Builders approved the assignment by Electro of the exclusive license under the said Gregory patents. Thereafter, commencing in 1919 defendant W&T instituted at least eight suits for infringement of said patent No. 1,142,361. In one of these suits the patent was held not to have been infringed; in the others the patent was held valid and infringed.

27. In 1917, defendant W&T acquired from one Major Carl R. Darnall the assignment of United States Letters Patent No. 1,007,647 covering an invention relating to chlorinating equipment. Thereafter defendant W&T instituted suit against the Village of Leroy, New York for infringement of said patent No. 1,007,647. The court held the patent valid and infringed.

28. On or about July 13, 1936, defendant W&T acquired from one Georg Ornstein an exclusive license under United States Letters Patent Nos. 1,944,803 and 1,944,804, covering inventions relating to chlorinating equipment. Said license is still in full force and effect.

29. On or about April 13, 1937, defendant W&T acquired from Dr. Richard Pomeroy and Arthur P. Bana United States Letters Patent No. 2,076,964 covering an invention relating to chlorinating equipment. Thereafter defendants W&T and W&T Sales induced others to have specifications issued for chlorinating equipment specifying the invention covered by said patent.

30. On or about December 3, 1936, defendant W&T acquired, from one H. J. Darcey, an exclusive license under United States Letters Patent No. 2,034,460 covering an invention relating to chlorinating equipment. Said license is for the life of the patent and is still in full force and effect.

Thereafter defendants W&T and W&T Sales induced others to have specifications issued for chlorinating equipment specifying the invention covered by said patent.

31. On or about July 30, 1940, in order to intimidate prospective purchasers of chlorinating equipment not manufactured by the defendants, defendant W&T instituted a patent infringement suit against the Borough of Ephrata, Pennsylvania, and one John Lewis, a contractor, for alleged patent infringement by reason of the installation of gas chlorinating equipment manufactured by the Everson Manufacturing Company, Chicago, Illinois. The case was dismissed by the Court on November 21, 1945, for want of prosecution.

32. In 1930, defendant W&T bought the assets of the Paradox Company, then in competition with defendant W&T in the manufacture and distribution of chlorinating equipment, and at various times after July 30, 1940, attempted to purchase the assets of Everson Manufacturing Company.

33. On or about May 1, 1940, in consideration of the payment of \$68,250 to Howard J. Pardee by defendant Orchard, and a promise by said Orchard to cause the employment of said Pardee by defendant W&T, at an annual salary of \$7,500, said Pardee caused the assets of the Pardee Engineering Company, then in competition with defendant W&T in the manufacture and distribution of chlorinating equipment, to be transferred to defendant Orchard. At all times since May 1, 1940, to the date of the filing of this complaint, said Pardee has been in the employ of defendant W&T.

34. On November 4, 1935, defendant W&T paid R. W. Sparling, then in competition with defendant W&T in the manufacture and distribution of chlorinating equipment, \$5,000 cash and agreed to pay \$10,000 per year thereafter for 17 years for which Sparling granted to defendant W&T an exclusive license to all proprietary and inventive rights in the Sparling chlorinator. Sparling agreed that neither he nor his son would engage in the chlorinating equipment business during the life of said agreement. Said agreement is still in full force and effect.

B. ACQUISITION OF PATENTS AND COMPETITORS SERVING THE FLOUR MILLING FIELD AND ORGANIZATION OF W&T SALES

35. Prior to the year 1928 defendant W&T licensed flour millers to use the patented Agene Process for the ageing

and bleaching of flour, and supplied said millers the chlorinating equipment with which to practice said process. Prior to 1928 the Novadel Process Company licensed flour millers to use the Novadel Process, and "Novadelox" covered by United States Letters Patent No. 1,539,701, a product for the bleaching of flour which competed with defendant W&T's Agene Process. On September 15, 1928, defendants W&T, W&T Products, Tiernan Orchard, Peet and others caused a new corporation to be formed under the name of Novadel-Agene Corporation, and caused to be transferred to it, among various assets, defendant W&T's rights under the Agene Process in consideration of the issue to W&T of approximately 40% of the voting stock of said Novadel-Agene Corporation and the exclusive rights hereinafter described. As a part of the same transaction, said Novadel Process Company transferred to said Novadel-Agene Corporation, along with other assets, its rights, including patent rights, to "Novadelox" and the Novadel Process,

24 and said defendant W&T entered into a contract with defendant Novadel under the terms of which defendant W&T was given (a) the exclusive right to manufacture all mechanical equipment, including chlorinating equipment required for the practice of any and all of the processes, including patented processes, owned by defendant Novadel, and (b) the exclusive agency for the distribution of Novadel's said processes and products.

36. Beginning in or about September 1928, defendants Novadel, W&T, and W&T Products marketed the processes and products of defendants Novadel and W&T designed to serve the flour milling industry throughout the United States under uniform contracts which, while varying from time to time in their formal aspects, required the users of said processes (a) to lease or buy equipment manufactured by defendant W&T, (b) to use in said equipment and in working the said processes only the material furnished by defendant Novadel, and (c) to obtain the necessary supplies and services required in connection with the use of said equipment and said processes from the defendants W&T, W&T Products, Novadel and Industrial. On or about April 28, 1942, defendant Novadel entered into new standard form contracts with certain flour millers under the terms of which said flour millers agreed to use the services, chlorinating equipment and maturing agents supplied by defendant Novadel for the ageing and bleaching of all the flour in all the mills of each of said millers. At no time since 1928

have defendants supplied ageing and bleaching materials to purchasers unless said purchasers used chlorinating equipment manufactured by defendant W&T.

37. Some time prior to the year 1930, one John Logan of Chicago, Illinois, began to produce a chlorine compound called "Beta Chlora" for maturing flour which competed with defendant Novadel's processes and "Novadelox", and said Logan organized the Industrial Appliance Corporation under the laws of Illinois for the production and marketing thereof. In August 1930 defendant

Novadel caused Industrial to be organized under the laws of Delaware and acquired all of its capital stock. Thereupon defendant Novadel caused Industrial to acquire all of the assets of Industrial Appliance Corporation of Illinois in order to eliminate from the market a flour bleaching and maturing agent which could be used without the use of W&T chlorinating equipment. On August 27, 1930, defendant Industrial entered into a contract with defendant W&T under the terms of which defendant W&T was constituted the exclusive agent of Industrial for the sale, installation, servicing and distribution of all apparatus, equipment including chlorinating equipment, and materials then in use, or thereafter to be used, in Industrial's business in the United States and Canada.

38. In 1933, defendants Orchard, Peet and others caused defendant W&T Sales to be organized under the laws of New Jersey for the purpose of transacting the business of W&T in certain states, principally on the West Coast of the United States. Thereafter W&T Sales entered into contracts with defendants W&T, W&T Products, Novadel and Industrial, by the terms of which W&T Sales was constituted the exclusive agent of said defendants in certain states in the United States for the sale and distribution of products manufactured by the said defendants. Each of said contracts fixed the price at which W&T Sales was to offer said products for sale.

39. In 1940, one Frederick H. Penn was conducting a business under the trade name and style of "Superlite Company" and, under patent No. 2,208,471, was manufacturing a benzoyl Peroxide bleaching compound known as "Superlite" for the bleaching of flour. "Superlite" was competitive with "Novadelox", the Agene process and "Beta Chlora". On August 16, 1938, defendant Novadel filed a suit for alleged patent infringement against said

26 Penn. In his answer to said suit Penn alleged that Novadel had improperly used said patents to create a monopoly in an unpatented article. In or about December 1941, in order to avoid a trial on the merits of the defense of said Penn and to eliminate from the market a flour bleaching and maturing agent which could be used without the use of W&T chlorinating equipment, defendant Novadel acquired the assets, including patents, under which Penn was conducting business as the Superlite Company.

C. PREEMPTION OF SOURCES OF SUPPLY OF PARTS FOR CHLORINATING EQUIPMENT

40. On or about July 28, 1931, defendant W&T entered into a contract with Hellige by the terms of which defendant W&T was given the exclusive sales agency, within the United States and Canada, for the sale of Hellige comparators in the price range below \$37 in the sanitary field. Defendant W&T agreed to refrain from the sale of comparators in the price range above \$37, in the United States and Canada, in the sanitary field, and Hellige agreed to refrain from selling comparators in the price range below \$37, within the United States and Canada, in the sanitary field. On April 15, 1941, because of fear of prosecution for violation of the federal antitrust laws, Hellige gave notice of cancellation of said written contract, but thereafter for a period of 16 months the parties agreed to continue to act, and did act, as if it were in full force and effect.

41. In or about the year 1931, defendant W&T entered into an agreement with Fairbanks by the terms of which Fairbanks agreed to sell scales for use with chlorinating equipment to defendant W&T exclusively. Said agreement is still in full force and effect, and Fairbanks has refused to sell said scales to competitors of defendants.

27 42. In or about the year 1931, defendant W&T entered into an agreement with Schutte-Koerting by the terms of which Schutte-Koerting agreed to sell its rotameters for use in the sanitary field to W&T exclusively. Said agreement is still in full force and effect, and Schutte-Koerting has refused to sell said rotameters to competitors of defendants.

D. DIVIDING THE FIELD AMONG THE DEFENDANTS FOR DISTRIBUTION OF CHLORINATING EQUIPMENT

43. In 1935, defendants W&T and Builders were in competition with each other in the manufacture and sale of chlorinating equipment and in the development, manufac-

ture and sale of telemetering equipment. In 1935, defendants Builders and Chafee entered into an agreement with defendants W&T and W&T Products by the terms of which defendants W&T and W&T Products agreed to refrain from the manufacture and sale of telemetering equipment for use in the industrial field, as distinguished from the sanitary field, and defendants Builders and Chafee agreed to limit the sales of Props' chlorinating equipment to installations involving the purification of less than 1,500,000 gallons of water per day. The parties agreed also to cooperate and work together for the best interests of both. Said agreement is still in full force and effect. Thereafter, applications for United States Letters Patent covering inventions relating to the process of telemetering having been acquired by defendant W&T from C. F. Wallace (Serial No. 588,595) and by defendant Builders from George T. Huxford (Serial No. 621,211), defendants W&T, W&T Products and Orchard, on April 21, 1938, pursuant to the aforesaid agreement of 1935, entered into license agreements with defendant Builders by the terms of which Builders acquired an exclusive license under said Wallace application and any patent thereafter issued upon said application, and defendant W&T Products acquired a non-exclusive license limited to the sanitary field and desliming under said Huxford application and any patent thereafter issued thereon and under eleven additional patents owned by defendant Builders. Said cross license is still in full force and effect.

28 E. PREEMPTION OF SALES OUTLETS FOR CHLORINATING EQUIPMENT

44. Commencing in or about the year 1925, and continuing until the date of the filing of this complaint, the defendants W&T, W&T Products and W&T Sales have entered into contracts with more than 150 large filter companies, construction companies, and general contractors. Said companies and contractors constitute the most important sales outlets for chlorinating equipment in the sanitary field. In said agreements said companies and contractors agreed to purchase and resell the chlorinating equipment of W&T exclusively, at the prices and on the terms and conditions fixed by defendants W&T, W&T Products and W&T Sales.

V. EFFECTS

45. The combination and conspiracy, attempt to monopolize and monopolization hereinbefore alleged have had many effects, among which are the following:

(a) The gas chlorinating equipment industry of the United States has been monopolized, and now is being monopolized, by defendants W&T, W&T Products, W&T Sales, Novadel and Industrial:

(b) Free and vigorous competition in the production and distribution of chlorinating equipment in interstate commerce in the United States has been prevented and restrained;

(c) Arbitrary, artificial, unreasonable, excessive and non-competitive prices have been exacted from purchasers of chlorinating equipment including the United States Government;

(e) Development and improvement of chlorinating equipment has been impeded and retarded;

(f) A substantial number of persons have been excluded from the chlorinating equipment industry and others have been restricted in their opportunity to engage in said industry.

20

PRAYER

WHEREFORE, plaintiff prays:

(1) That the aforesaid monopoly, attempt to monopolize, the combination and conspiracy to monopolize, and the contracts, combination and conspiracy in restraint of trade be adjudged to be unlawful and that the agreements, understandings, acquisitions, contracts and practices alleged in this complaint be adjudged and decreed to be in violation of the Sherman Act.

(2) That the Court adjudge and decree that the defendants have contracted, combined and conspired to restrain and monopolize and have attempted to monopolize and have monopolized trade in chlorinating equipment in violation of Sections 1 and 2 of the Sherman Act.

(3) That the Court adjudge and decree that the defendants have used their patents unlawfully as a means of attempting to monopolize and monopolizing trade and restraining competition and in furtherance of the combination and conspiracy, attempt to monopolize and monopolization hereinabove alleged, and that the plaintiff have such relief with respect to the defendants' patents as the Court may deem appropriate and necessary to dissipate the effects of the unlawful use of said patents and to prevent further unlawful use thereof.

(4) That each of the individual defendants, Martin F. Tierman, William J. Orchard, Gerald D. Peet and Harold S. Hutton, be directed to resign their offices and director-

ships in defendants Novadel and Industrial, and that the defendant W&T be directed to sell all the stock it now owns or controls in the defendant Novadel, and that each of the defendants, and the officers, directors, and employees of defendants W&T, W&T Sales and W&T Products, be enjoined from holding any office or directorship in, or owning or controlling any of the capital stock, bonds or other evidences of indebtedness, or assets of defendants Novadel and Industrial.

30 (5) That each of the corporate defendants be enjoined from acquiring any of the assets, capital stock, bonds or other evidences of indebtedness of any other corporations engaged in the manufacture or distribution of chlorinating equipment.

(6) That each of the individual defendants be enjoined from acquiring, owning or controlling any of the assets, capital stock, bonds, or other evidences of indebtedness of more than one corporation engaged in the manufacture or distribution of chlorinating equipment; provided that defendants W&T, W&T Products and W&T Sales be considered as one corporation for the purpose of this injunction.

(7) That each of the individual defendants be enjoined from holding at the same time office or directorship in more than one corporation engaged in the manufacture or distribution of chlorinating equipment; provided that this injunction shall not prevent an individual defendant from holding offices or directorships at the same time in W&T, W&T Products and W&T Sales.

(8) That, except as to documents required from all bidders by prospective purchasers, the defendants be enjoined for 10 years from submitting plans, drawings or specifications of chlorinating equipment to such purchasers or their agents including consulting engineers.

(9) That the defendants be enjoined from engaging in each of the unlawful means of restraining and monopolizing commerce in chlorinating equipment set forth in paragraph 24 of this complaint, and that the Court order and direct each of the corporate defendants to instruct each of its employees in writing that the practices described in paragraph 24 of this complaint are illegal and that each of said employees is immediately to cease and desist and permanently refrain from engaging in said practices.

31 (10) That the Court order and direct defendant W&T to address to the mayor or other executive head of every city in the United States having a population in

excess of 25,000 and to the Department of Health of every state of the United States a letter, approved by the Court and within such time as the Court may deem just and proper, enclosing a copy of the final judgment and order of this Court.

(11) That each of the agreements referred to in paragraphs 34, 35, 38, 39, 41, 42, 43 and 44 of this complaint be adjudged and decreed to be an agreement in restraint of trade and part of a conspiracy to restrain and monopolize trade in chlorinating equipment, that it be adjudged and decreed to be unlawful and that the observance of such agreement in any respect and the execution of similar agreements by the defendants herein be perpetually enjoined.

(12) That each of the defendants Novadel and Industrial be enjoined from leasing or occupying any real property owned or controlled by defendants W&T, W&T Products or W&T Sales or from employing or using or sharing the services of any employee or employees of the defendants W&T, W&T Products or W&T Sales.

(13) That each of the defendants W&T, W&T Products, W&T Sales, Novadel and Industrial be enjoined from offering for sale, selling, or delivering chlorinating equipment, or providing the services of technicians and service engineers, on terms more favorable to those who agree to use or sell only equipment manufactured or sold by defendants than to those who do not so agree.

(14) That each of the defendants W&T, W&T Products, W&T Sales, Novadel and Industrial be enjoined from requiring any licensee under any patent owned or controlled by any of said defendants to purchase or use chlorinating equipment of any specified manufacture.

32 (15) That each of the defendants W&T, W&T Products, W&T Sales, Novadel and Industrial be enjoined from refusing to sell or to supply chlorinating equipment or agents for bleaching and ageing flour or services in connection therewith except on the condition that the purchaser agree to purchase, or purchase (a) the total requirements of the purchaser for said materials, services or equipment from the defendants, or any of them, or (b) other equipment or supplies from said defendants or from any other specified person, firm or corporation.

(16) That each of the defendants Novadel and Industrial be enjoined from entering into any contract or agreement for the purchase, sale or use of chlorinating equipment that requires Novadel or Industrial to obtain all or

substantially all of their requirements of chlorinating equipment from any one or more of the other defendants, and that each defendant be enjoined from acting as agent of Novadel or Industrial in the sale, marketing, or licensing of any product of patent owned or controlled by defendants Novadel or Industrial.

(17) That the defendants W&T, W&T Sales and W&T Products, during such time as shall be required to dissipate the illegal restraints of trade and monopoly described in this complaint, be enjoined from refusing to sell chlorinating equipment to any prospective purchaser to the extent available in the normal course of their business upon reasonable and non-discriminatory prices and other terms and conditions of sale; provided, that said sales not be required to be made to a prospective purchaser not having a proper credit rating, unless said purchaser offers to pay cash.

(18) That pursuant to Section 5 of the Sherman Antitrust Act, writs of subpoena issue directed to such of the defendants, as are not otherwise subject to service within the District, commanding them and each of them to appear herein and to answer under oath each allegation contained in this complaint and to abide by and perform such acts, orders, and decrees as the court may make in the premises.

23 (19) That the plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper.

(20) That the plaintiff recover its taxable costs.

CHALMERS HAMILL, /s/
Special Assistant Attorney General.

ALFRED KARSTED, /s/
KENZIE K. KIRKHAM, /s/
Special Attorneys.

TOM C. CLARK, /s/
Attorney General.

WENDEL BERGE, /s/
Assistant Attorney General.

GEORGE F. TROY, /s/
United States Attorney.

34 In the United States District Court

Answer of Defendants, Builders Iron Foundry and Henry S. Chafee—Filed May 14, 1947.

The defendants, Builders Iron Foundry and Henry S. Chafee, hereby answer the complaint as follows:

1. Said defendants admit the allegations of Paragraph 1 of the complaint.

2. With respect to the allegations of Paragraph 2 of the complaint, said defendants admit that Builders Iron Foundry maintains offices, transacts business and inhabits the District of Rhode Island. They deny the other allegations of said Paragraph.

3. With respect to the allegations of Paragraph 3 of the complaint, said defendants admit that Builders Iron Foundry was incorporated in Rhode Island and that the location of its principal office is in Providence, Rhode Island. Said defendants allege that they are without knowledge or information with respect to the other allegations of said Paragraph sufficient to form a belief as to the facts alleged therein and they therefore deny all of said other allegations.

35. 4. With respect to the allegations of Paragraph 4 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

5. With respect to the allegations of Paragraph 5 of the complaint, said defendants admit that Henry S. Chafee is employed by Builders Iron Foundry as President, Treasurer and Director, and that his address is Providence, Rhode Island. They deny that Henry S. Chafee has authorized, ordered or done the alleged illegal acts complained of or that he is now authorizing, ordering or doing the alleged current illegal acts referred to in the complaint. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

6. Said defendants admit the allegations of Paragraph 6 of the complaint except as to item (c) as to which they are without knowledge or information sufficient to form a belief and which they therefore deny.

7. Said defendants admit the allegations of Paragraph 7 of the complaint.

8. Said defendants admit the allegations of Paragraph 8 of the complaint.

9. With respect to the allegations of Paragraph 9 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to

the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

10. With respect to the allegations of Paragraph 10 of the complaint, said defendants admit that gas-chlorinating equipment is purchased and used by the Federal Government and by State, Municipal, and other governments for use in the purification of water and sewage. With respect to the other allegations of said Paragraph 10, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

11. With respect to the allegations of Paragraph 11 of the complaint, said defendants admit that many sales of gas chlorinating equipment are made in connection with contracts for the installation of water purification systems. They deny the remaining allegations of said Paragraph 11.

12. With respect to the allegations of Paragraph 12 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

13. With respect to the allegations of Paragraph 13 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

14. With respect to the allegations of Paragraph 14 of the complaint, said defendants admit that gas chlorinating equipment is employed by paper and textile mills and by laundries to utilize chlorine as a bleach and that it is also used in various industrial plants for the purpose of sterilization and of desliming boilers, condensers, and other water equipment. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph 14.

15. With respect to the allegations of Paragraph 15 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

16. With respect to the allegations of the first sentence of Paragraph 16 of the complaint, said de-

defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of the allegations of said sentence. They deny the remaining allegations of said Paragraph 16 and allege that Builders Iron Foundry is a manufacturer of gas chlorinating equipment.

17. With respect to the allegations of Paragraph 17 of the complaint, said defendants admit the allegations contained in the first and last sentences thereof. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

18. With respect to the allegations of Paragraph 18 of the complaint, said defendants admit the allegations of the first and third sentences thereof. They deny the allegations of the second sentence thereof and allege that Builders owns 1130 out of 2000 shares of the outstanding stock of Props. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

19. With respect to the allegations of Paragraph 19 of the complaint, said defendants estimate that the total sales of chlorinating equipment by defendant Builders and by Props in the year 1944 were in excess of \$390,000. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

20. With respect to the allegations of Paragraph 20 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

21. With respect to the allegations of Paragraph 21 of the complaint, said defendants admit the allegations of the third sentence thereof. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

22. With respect to the allegations of Paragraph 22 of the complaint, said defendants allege that they are without

knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

23. With respect to the allegations of Paragraph 23 of the complaint, said defendants deny said allegations in so far as they relate to said defendants or either of them. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

24. With respect to the allegations of Paragraph 24 of the complaint, said defendant deny said allegations in so far as they relate to said defendants or either of them. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

25. With respect to the allegations of Paragraph 25 of the complaint, said defendants deny said allegations in so far as they relate to said defendants or either of them. With respect to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

26. With respect to the allegations of Paragraph 26 of the complaint, said defendants admit that Builders approved an assignment by Electro of the exclusive license under said Gregory patents. They deny that such approval was in furtherance of or part of any combination or conspiracy to restrain or monopolize trade or commerce among the several states in chlorinating equipment. As to the other allegations of said Paragraph, said defendants allege that they are without knowledge or information sufficient to form a belief as to the same, and they therefore deny all of said other allegations of said Paragraph.

27. With respect to the allegations of Paragraph 27 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

28. With respect to the allegations of Paragraph 28 of the complaint, said defendants allege that they are without

knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

29. With respect to the allegations of Paragraph 29 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

30. With respect to the allegations of Paragraph 30 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

31. With respect to the allegations of Paragraph 31 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

32. With respect to the allegations of Paragraph 32 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

33. With respect to the allegations of Paragraph 33 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

34. With respect to the allegations of Paragraph 34 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

35. With respect to the allegations of Paragraph 35 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

36. With respect to the allegations of Paragraph 36 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

37. With respect to the allegations of Paragraph 37 of the complaint, said defendants allege that they are without

knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

38. With respect to the allegations of Paragraph 38 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

39. With respect to the allegations of Paragraph 39 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

40. With respect to the allegations of Paragraph 40 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

41. With respect to the allegations of Paragraph 41 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

42. With respect to the allegations of Paragraph 42 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

43. With respect to the allegations of Paragraph 43 of the complaint, said defendants admit that in 1935 defendants W & T and Builders were in competition with each other in the manufacture and sale of chlorinated equipment, and in the development, manufacture, and sale of telemetering equipment, and allege that they have been at all times since then, and now are, engaged in such

competition. Said defendants admit that on April 21, 1938, defendants W & T Products and Builders entered into license agreements by the terms of which Builders acquired an exclusive license under said Wallace application and any patent thereafter issued upon said application, and defendant W & T Products acquired a non-exclusive license limited to public health installations, and slime control installations under said Huxford application and any patent thereafter issued thereon, and under eleven (11) additional patents owned by Builders. Said

defendants admit that said cross license agreements are still in force and effect. Said defendants deny that said license agreements of April 21, 1938 were pursuant to any prior agreement whatsoever. Said defendants deny all other allegations of said Paragraph 43.

44. With respect to the allegations of Paragraph 44 of the complaint, said defendants allege that they are without knowledge or information sufficient to form a belief as to the facts alleged therein, and they therefore deny all the allegations of said Paragraph.

45. Said defendants deny the allegations of Paragraph 45 of the complaint.

46. Further answering, said defendants allege that plaintiff had notice of all of the pertinent facts and acts with respect to the subject matter of the complaint and, nevertheless, it refrained from commencing this action until November 18, 1946 and has thereby been guilty of such laches as should in equity bar the plaintiff from maintaining this action.

BUILDERS IRON FOUNDRY

HENRY S. CHAFEE

By their Attorneys,

CHAUNCEY E. WHEELER, /s/

S. EVERETT WILKINS, JR.,

HINCKLEY, ALLEN, TILLINGHART
& WHEELER.

May 14, 1947.

43

In United States District Court

*Motion to Vacate Order on Motion for Return
of Photostat Copies of Documents—Filed
April 14, 1948*

The United States, plaintiff herein, moves the Court to vacate the ORDER ON MOTION FOR RETURN OF PHOTOSTAT COPIES OF DOCUMENTS entered on February 18, 1948 in *United States v. Wallace & Tiernan Company, Inc., et al.*, Indictment No. 6055, on the following grounds:

- (1) The photostatic copies of documents which are the subject of said order are necessary to plaintiff for the trial of this cause;
- (2) Knowledge of the existence and contents of many of the documents from which said photostatic copies were prepared was obtained by plaintiff prior to, and independently of, the grand jury investigation

conducted by the additional grand jury for the November 1945 term of this Court.

Dated: April 14-48, Boston, Massachusetts.

GRANT W. KELLEHER /s/
Special Assistant to the Attorney General.

ALFRED KARSTED /s/
Special Attorney.

Service acknowledged and of
two affidavits.

WM. H. EDWARDS /s/
EDWARDS & ANGELL
*Attorneys for the three W. & T.
Companies appearing specially
and for this purpose only.*

TOM C. CLARK
Attorney General

JOHN F. SONNETT
Assistant Attorney General

14 April 1948
12 noon

44

In United States District Court

Affidavit of Alfred Karsted, Esq., in Support of Motion to Vacate Order on Motion for Return of Photostat Copies of Documents—Filed April 14, 1948

ALFRED KARSTED, Esq., of Boston, in the County of Suffolk, Commonwealth of Massachusetts, being first duly sworn, upon his oath and on information and belief, deposes and says:

Affiant is a Special Attorney in the Antitrust Division of the Department of Justice. Since April 1945, he has been actively engaged in the investigation of alleged violations of the antitrust laws by members of the chlorinating equipment manufacturing industry, including Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, and Novadel-Agene Corporation. He assisted in the presentation of evidence concerning such alleged violations to the additional grand jury for the November 1945 term of this court and in the preparation of the complaint in this cause.

In support of the charges made in this case, plaintiff relies principally upon documents from the files of the

aforesaid companies, the relevancy and materiality of which appear in affiant's affidavit filed in support of the Motion for Production of Documents under Rule 34.

There are in excess of 5,000 such documents in the possession of the companies. To prepare for trial, plaintiff must have available to its copies of said documents in order to select and organize those which it deems desirable to offer in evidence in the trial of the case and to facilitate the pre-trial preparation of witnesses whose recollection must be refreshed by the contents of many of the documents.

The photostatic copies of documents involved in the order of this court of February 18, 1948, are the only copies in the possession of plaintiff of the aforesaid documentary evidence. If plaintiff is compelled to return said photostatic copies to said companies and is not permitted to obtain other copies of the documents, plaintiff will not be able to organize its documentary evidence nor to prepare its witnesses and, therefore, will be unable to prepare adequately for the trial of this cause.

ALFRED KARSTED /s/

Duly sworn to by Alfred Karsted.

Jurat omitted in printing. (All in italics.)

46 In United States District Court

*Motion for Production of Documents Under
Rule 34—Filed April 14, 1948*

The United States, plaintiff herein, moves the Court to order the defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation to produce and to permit plaintiff to inspect and copy or photograph each of the following documents which are in the possession, custody, or control of the defendants:

Those of the documents produced by defendants before the additional grand jury for the November 1945 term of this Court which were subjects of the photostatic copies from time to time delivered by the Government to defendants and which were returned to defendants pursuant to the order of this Court entered on March 19, 1947 in *United*

States v. Wallace & Tiernan Company, Inc., et al, Indictment No. 6055. Said documents may be more particularly identified by reference to plaintiff's Office Record of Documents, a photostatic copy of which is filed herewith as an appendix hereto and made a part hereof, as follows:

The second column of said Record sets forth certain numerals which appear on each of said documents, said numerals having been stamped on each of said documents by defendants prior to production of the documents before the grand jury;

- 47 • The fifth column of said Record sets forth either the title appearing on the file folder in which each of said documents was contained when produced before the grand jury or the descriptive title given by the Government to the document when it was not contained in a titled file folder, which title appears upon the envelope in which each document was returned to defendants pursuant to the aforesaid order of this Court of March 19, 1947.

Defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation have the possession, custody, or control of each of the foregoing documents. Each of them constitutes or contains evidence relevant and material to the matters involved in this action as is more fully shown in the affidavit of Alfred Karsted, Esq., filed in support hereof.

Dated: April 14, 1948, Boston, Massachusetts.

GRANT W. KELLEHER, /s/
Special Assistant to the Attorney General.

ALFRED KARSTED, /s/
Special Attorney.

Service acknowledged and of two affidavits.

WM. H. EDWARDS, /s/
EDWARDS & ANGELL,
Attorneys for the Three W. & T. Companies.
Appearing specially and for this purpose only.

TOM C. CLARK,
Attorney General.
JOHN F. SONNETT,
Assistant Attorney General.

4-14-48
12 noon

340 In United States District Court

*Affidavit of Alfred Karsted in Support of Motion for
Production of Documents Under Rule 34—
Filed April 14, 1948*

ALFRED KARSTED of Boston, in the County of Suffolk, Commonwealth of Massachusetts, being first duly sworn, upon his oath and on information and belief, deposes and says:

Affiant is a Special Attorney in the Antitrust Division of the Department of Justice. Since April 1945, he has been actively engaged in the investigation of alleged violations of the antitrust laws by members of the chlorinating equipment manufacturing industry, including Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation. He assisted in the presentation of evidence concerning such alleged violations to the additional grand jury for the November 1945 term of this court and in the preparation of the complaint in this cause.

I. The Control of the Documents Called for by the Motion.

The documents described in the motion to which this affidavit is attached are documents belonging to Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, all of which companies have their offices in the same building in Belleville, New Jersey. The documents were produced by those companies in response to grand jury subpoenas *duces tecum* issued April 29, 1946 out of the District Court for the District of Rhode Island, were impounded by order of the Court dated June 3, 1946, and were returned to the companies by the Government pursuant to the Court's order entered on March 19, 1947.

II. The Relevancy of the Documents Called for by the Motion.

The complaint in this action charges Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and others, with unlawfully monopolizing and attempting to monopolize interstate trade and commerce in gas chlorinating equipment and with unlawfully combining and conspiring to restrain said interstate trade and commerce, in violation of Sections 1 and 2 of the Sherman Act.

The complaint charges that said combination and conspiracy, attempt to monopolize and monopolization, have consisted of and now consist of and have been carried out by and are being carried out by, a continuing agreement and concert of action among the defendants, the substantial terms of which have been that the defendants exclude others from the manufacture and distribution of chlorinating equipment and eliminate competition among themselves in the manufacture and distribution of chlorinating equipment by sixteen types of activities which are set forth in paragraphs 24(a) to (p).

In paragraph 24(a) of the complaint, the defendants are charged with "acquiring by purchase, from persons other than their own employees, patents and exclusive rights under patents, covering inventions relating to chlorinating equipment." This allegation is supported by the documents called for in the motion and described as follows in the Government's "Office Record of Documents" filed with the motion:

Agreement with Banta

Agreement with Scott-Darcey

Agreement with Ornstein

Paragraph 24(c) of the complaint charges the defendants with "inducing competitors to agree not to engage in the manufacture and distribution of chlorinating equipment." This allegation is supported by the documents called for in the motion and described as follows in the Government's "Office Record of Documents" filed with the motion:

Agreement with Sparling

Paragraph 24(d) of the complaint charges the defendants with "acquiring the capital stock or assets of competitors." This allegation is supported by the documents called for in the motion and described as follows in the Government's "Office Record of Documents" filed with the motion:

Agreement with Pardee Engineering Company

Paragraph 24(f) of the complaint charges the defendants with "inducing others not to sell various parts, devices and appliances required for the manufacture, sale or operation of chlorinating equipment to anyone save the defendants." This allegation is supported by the documents called for in the motion and described as follows in the Government's "Office Record of Documents" filed with the motion:

Agreement with Hellige, Inc.

Agreement with Fairbanks, Morse & Company

Paragraph 34(g) of the complaint charges the defendants with "dividing the field for distribution of gas chlorinating equipment by agreeing that certain of the defendants would not manufacture or sell chlorinating equipment having a capacity in excess of 1,500,000 gallons of water per day." This allegation is supported by the documents called for in the motion and described as follows in the Government's "Office Record of Documents" filed with the motion:

Agreement with B. I. F.

Paragraph 24(h) of the complaint charges the defendants with "entering into agreements with large filter and construction companies and general contractors of the type referred to in paragraph 11 of this complaint under the terms of which said companies and contractors agree to distribute only defendants' chlorinating equipment." This allegation is supported by the documents called for in the motion and described as follows in the Government's "Office Record of Documents" filed with the motion:

Agency Agreements

The remainder of the documents called for in the motion and described in the Government's "Office Record of Documents" filed with the motion consists of particular documents found in the various "job files," interoffice files, branch office files, specification files and other files of the defendant companies. These documents consist principally of correspondence and memoranda concerning actual or potential sales of chlorinating equipment together with plans, specifications and purchase orders in connection with such sales. The documents illustrate the actual working of the alleged conspiracy and show the various ways in which the defendants attempted to prevent competitors from obtaining contracts for the installation by them of chlorinating equipment made by such competitors. Thus, the documentary evidence of this type called for by the motion tends to prove the following activities of the defendants designed to monopolize and restrain trade, as alleged in paragraphs 24 to 46, inclusive, of the complaint herein:

1. When possible, the defendants attempted to prevent their competitors from receiving invitations to bid for contracts for chlorinating equipment. When the defendants were unsuccessful in this maneuver, they attempted to see to it that the specifications for the chlorinating equipment for the particular job were such as to make it impossible for any competitor to

comply with them. For this purpose the defendants systematically prepared and submitted to the engineers and consulting engineers in charge of the various jobs "suggested specifications" for chlorinating equipment designed to shut out all competitors by calling for features which only the defendants' equipment embodied. In the making of these specifications the conclusive agreements and patent licenses with Spaulding and others, hereinbefore referred to, were utilized for the purpose of drawing specifications with which only the defendants could comply. The defendants sought to influence engineers, consulting engineers, purchasing agents and the like to cause the adoption of the suggested specifications submitted by the defendants.

2. On those occasions in which the defendants' competitors succeeded in having jobs awarded to them, the defendants systematically attempted to, and in a large number of cases did, cause competitors' bids to be rejected. In such instances, the defendants thereafter systematically underbid their competitors for the sole purpose of preventing their competitors' equipment from being installed on the jobs.

3. The defendant companies succeeded in inducing virtually all large filter companies and contracting companies which purchased and installed chlorinating equipment to enter into exclusive agreements with the defendant companies obligating such filter and contracting companies to handle only the chlorinating equipment of the defendant companies.

34.5 On a substantial number of large jobs the chlorinating equipment required was not called for as a separate item in the invitation to bid but was included as a part of a larger water filtration plant or sewage disposal plant; since such jobs could only be bid by the large filter and contracting companies which were capable of handling the entire bid, competitors of the defendant companies were completely excluded from bidding on such jobs by the aforesaid agency agreements.

4. The defendants from time to time circulated false rumors and unfair reports concerning the equipment of their competitors for the purpose of having their competitors' bids rejected, and from time to time, after having prevented the issuance to competitors of invitations to bid, the defendants induced the companies with which they had agency agreements to submit complementary or dummy bids solely in order to provide

color of compliance with laws or regulations requiring a minimum number of bids before a job could be awarded, and at the same time to assure the award of the bid to a company bound by an agency agreement to use Wallace and Tiernan chlorinating equipment on the proposed job.

ALFRED KARSTED.

Duly sworn to by Alfred Karsted.

Jurat omitted in printing. (All in italics.)

347 In United States District Court

*Affidavit of Chalmers Hamill in Support of Motion for
Production of Documents Under Rule 34 and
Motion to Vacate Order on Motion for Return
of Photostat Copies of Documents—
Filed April 14, 1948*

CHALMERS HAMILL, of the City of Washington, District of Columbia, being first duly sworn, upon his oath and on information and belief, deposes and says:

Affiant is a Special Assistant to the Attorney General of the United States assigned to the Antitrust Division of the Department of Justice. From October 1, 1942, until January 1, 1947, he had supervision and was in active charge of an investigation by the Antitrust Division of alleged violations of the antitrust laws by members of the chlorinating equipment manufacturing industry, including Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation. Assisting affiant in said investigation and acting under his immediate supervision and direction were Alfred Karsted and Kenzie K. Kirkham, Special Attorneys in the Antitrust Division of the Department of Justice and Roy C. Cook, an economic expert in the Antitrust Division of the Department of Justice.

In furtherance of the aforesaid investigation and pursuant to a voluntary agreement between the Antitrust Division and Wallace & Tiernan Company, Inc., on December 18, 1944, Mr. Cook under the direction of affiant, commenced an examination of certain of the files of the company at its offices in Belleville, New Jersey. After Mr. Cook had examined certain of the files of the company over a period of about 3 days, the company declined voluntarily to allow representatives of the Department of Justice to conduct any further examination of its files. Thereupon affiant on February 6, 1945, caused to be issued out of the United States District Court, for the

District of New Jersey, Trenton Division, a subpoena *duces tecum* directed to Wallace & Tiernan Company, Inc., returnable on March 6, 1945, requiring the production before a grand jury for said court of certain designated files and documents of the company.

On March 1, 1945, an agreement was reached between the Antitrust Division and Wallace & Tiernan Company, Inc., under the terms of which representatives of the Antitrust Division were to be admitted to the premises of the company at Belleville, New Jersey, for the purpose of examining documents which the company proposed and agreed to assemble in compliance with the subpoena. Pursuant to this understanding, from time to time from March 1, 1945, through October 5, 1945, affiant and the aforesaid other representatives of the Antitrust Division, acting under the immediate direction and supervision of affiant, examined numerous files and documents of the company produced by it because of the aforesaid subpoena *duces tecum*. No photostatic copies of documents thus examined were made at that time, but extensive notes and excerpts were made by all representatives of the Division for the purpose of enabling identification of the files and documents considered to be material to the investigation.

Upon the completion of the aforesaid file examination, the Antitrust Division elected to conduct the investigation of the chlorinating equipment manufacturing industry before a grand jury sitting in the United States District Court for the District of Rhode Island instead of before a grand jury sitting in the United States District Court for the District of New Jersey. Upon affiant's request, an additional grand jury was impaneled by this Court at Providence, Rhode Island, on April 29, 1946, to hear evidence in said investigation. Said grand jury heard evidence in said investigation from time to time during the period from April 29, 1946, to November 18, 1946.

On April 29, 1946, subpoenas *duces tecum* were issued out of this court directed to Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, calling upon them to produce before the additional grand jury certain designated documentary material, including numerous of the documents and files examined at Belleville, New Jersey, in the aforesaid file examination conducted during the period from March 1, 1945, to October 5, 1945. From time to time during the course of the grand jury investigation, the companies produced certain of the documents required by said subpoenas.

The documents so produced by the companies were impounded under order of this Court. From time to time during the grand jury investigation, photostatic copies of certain of the documents so produced were made under affiant's direction. Pursuant to arrangements between counsel for the Wallace & Tiernan Companies and affiant, duplicate photostatic copies of all such documents so photostated were delivered to said counsel.

The Appendix to plaintiff's Motion for Production of Documents under Rule 34 herewith filed in this cause consists of an Office Record of Documents maintained under affiant's direction and supervision which identifies certain of the documents of the Wallace & Tiernan companies selected during the course of the grand jury investigation and photostated by the Government. The first column of
350 the Record sets forth identifying numbers running chronologically from 10,001 to 15,424, inclusive, assigned by the Government to the documents which were photostated. Said numbers do not appear upon the documents themselves. However, each document bears stamped numerals placed thereon by representatives of the companies prior to production of the documents in response to said subpoenas *duces tecum*. Those numerals so stamped by representatives of the Companies upon the documents selected for photostating are set forth in the second column of said Record. Most of the documents produced by the companies were contained in file folders bearing titles placed thereon by the companies; in some instances the documents were not in folders or were in folders which did not bear titles. The fifth column of the said Record sets forth titles of the file folders from which the documents were extracted, or, in those instances where the documents were not taken from titled file folders, the titles assigned by the Government to describe such documents.

Affiant avers that numerous of the files described in said Office Record were produced by Wallace & Tiernan Company for examination by the aforesaid representatives of the Antitrust Division and were examined by them under the direction of affiant at the company's offices at Belleville, New Jersey, during the period between March 1, 1945, and October 5, 1945. In particular, affiant avers that during the course of said examination, he and the other representatives of the Antitrust Division acting under his immediate supervision and direction examined and thereby learned of the existence and contents of each of the documents identified in the aforesaid Office Record by the following numbers appearing in the first column thereof:

Page	No.		Page	No.
151	22	10,394-10,396, Inc.	164	12,973
	23	10,397-10,414	165	13,065-12,066, Inc.
	24	10,415-10,432	166	13,067-13,084
	25	10,433-10,447	167	13,085-13,096
	26	10,451-10,468	173	13,222-13,236
	27	10,469-10,477	182	13,389-13,392
		10,485-10,486	190	13,539-13,544
	28	10,487-10,504	191	13,545-13,562
	29	10,505-10,509	192	13,563-13,580
		10,514-10,522	193	13,581-13,591
	30	10,540	201	13,735-13,742
	31	10,541-10,558	202	13,743-13,760
	32	10,559-10,576	203	13,761-13,778
	33	10,577-10,593	204	13,779-13,796
	34	10,600-10,612	205	13,797-13,808
	35	10,613-10,630		13,812-13,814
	36	10,631-10,634	206	13,815-13,827
		10,639-10,648	207	13,841-13,850
	37	10,649-10,651	208	13,864-13,868
	41	10,726-10,738	209	13,869-13,886
	42	10,739-10,755	210	13,887-13,904
	49	10,872-10,882	211	13,914-13,921
	86	11,541-11,548	212	13,933-13,940
	87	11,549-11,566	213	13,941-13,952
	88	11,567-11,570	214	13,960-13,976
	88a	11,571-11,576	215	13,977-13,988
	94	11,680-11,698		13,991-13,994
	95	11,699-11,700	216	13,995-14,003
	124	12,222-12,227	217	14,028-14,030
	126	12,260-12,274	218	14,031-14,048
	127	12,275-12,276	219	14,049-14,066
	140	12,521-12,526	220	14,067-14,080
	141	12,527-12,543		14,083-14,084
	142	12,551-12,562	221	14,085-14,097
	143	12,563-12,586	224	14,140-14,141
	144	12,581-12,598	227	14,203-14,210
	145	12,599-12,603	228	14,211-14,212
	146	12,633-12,634	230	14,259-14,264
	147	12,635	231	14,265-14,275
	148a	12,679-12,688	235	14,337-14,346
	149	12,689-12,690	236	14,359-14,372
	150	12,714-12,724	237	14,373-14,390
	156	12,829-12,832	238	14,391-14,408
	157	12,833-12,837	239	14,409-14,413
	159	12,871-12,878	242	14,463-14,475
	160	12,893-12,904	243	14,481-14,498
	161	12,905-12,922	244	14,499-14,516
	162	12,923-12,940	245	14,517-14,534
	163	12,941-12,948	246	14,535-14,551

Page	No.	Page	No.
247	14,553-14,570, Inc.	256	14,721-14,730, Inc.
248	14,571-14,588	257	14,750
249	14,589-14,606	258	14,751-14,768
250	14,607-14,624	259	14,769-14,774
251	14,625-14,637	264	14,869-14,874
254	14,680-14,696	293	15,386-15,397
255	14,697-14,703	294	15,398-15,409

353 When the Government returned the documents described in the aforesaid Office Record to counsel for the Wallace & Tiernan companies, pursuant to the order of this Court entered on March 19, 1947, requiring the return of impounded documents of the companies, said documents were returned in envelopes bearing either the titles appearing upon the file folders, in which the documents were contained when produced before the grand jury, or the descriptive titles given by the Government to such of the documents as were not produced in titled file folders.

/s/ CHALMERS HAMILL

Duly sworn to by Chalmers Hamill.

Jurat omitted in printing. (All in italics.)

Duly sworn to by Chalmers Hamill jurat omitted in printing. (All in italics)

354 In United States District Court

*Motion for Production of Photostatic Copies of Documents
Surrendered by Plaintiff—Filed April 22, 1948.*

Upon the affidavits filed in support of plaintiff's Motion to Vacate Order on Motion for Return of Photostat Copies of Documents, the United States, plaintiff herein, moves the Court to order the defendants, Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, and Novadel-Agene Corporation, to return to plaintiff the photostatic copies of documents surrendered to said defendants by plaintiff pursuant to the Order on Motion for Return of Photostat Copies of Documents entered on February 18, 1948, and Order on Motion to Stay Orders entered on April 20, 1948, in *United States v. Wallace & Tiernan Company, Inc., et al.*, Indictment No. 6055, on the following grounds:

- (1) The photostatic copies of documents which are the subject of said order are necessary to plaintiff for the trial of this cause;
- (2) Knowledge of the existence and contents of many of the documents from which said photostatic copies

355 were prepared was obtained by plaintiff prior to, and independently of, the grand jury investigation conducted by the additional grand jury for the November 1945 term of this Court.

Dated April 22, 1948, Boston, Massachusetts.

GRANT W. KELLEHER, /s/

Special Assistant to the Attorney General

ALFRED KARSTED, /s/

Special Attorney

TOM C. CLARK

Attorney General

JOHN F. SONNETT

Assistant Attorney General

To:

William H. Edwards, Esquire

1109 Hospital Trust Building

Providence, Rhode Island

Edward T. Hogan, Esquire

315 Grosvenor Building

Providence, Rhode Island

Please taken notice that a motion of which the foregoing is a true copy has this day been filed in the Office of the Clerk of the United States District Court for the District of Rhode Island. Said motion will be in order for hearing at 10:00 a.m. on May 5, 1948, or as soon thereafter as the parties may be heard.

GRANT W. KELLEHER, /s/

Special Assistant to the Attorney General

ALFRED KARSTED, /s/

Special Attorney

I hereby certify that I have made service of the above motion by leaving a copy thereof at the offices of the above attorneys for the defendants with some person in charge thereof on this 22nd day of April 1948 at 2:45 P. M.

JOSEPH L. BREEN, /s/

356

In United States District Court

*Affidavit of William H. Edwards in Opposition to Three
Motions (Specified Below) Filed Herein by the
Plaintiff—Filed April 30, 1948*

I, WILLIAM H. EDWARDS, of the City and County of Providence and State of Rhode Island, on oath make affidavit and say:

1. I am of counsel for Wallace & Tiernan Company, Inc., and certain other parties in the above entitled cause (as appears more particularly from the appearances filed herein).

2. This affidavit is filed in opposition to the following three motions filed herein by the plaintiff: (1) "Motion to Vacate Order on Motion for Return of Photostat Copies of Documents;" (2) "Motion for Production of Documents Under Rule 34;" and (3) "Motion for Production of Photostatic Copies of Documents Surrendered by Plaintiff."

3. This Honorable Court in Indictment No. 6055 under date of 19 March 1947 rendered an opinion dismissing the indictment and discharging the defendants on the ground that the Grand Jury which had returned said indictment was illegally constituted. A copy of the decision of District Judge Hartigan dismissing the indictment is marked Exhibit A, is attached hereto and is hereby incorporated

as a part hereof. Indictment No. 6055 was an indictment against Wallace & Tiernan Company, Inc., and other parties represented by this affiant and also against certain other parties for alleged criminal violations of the Sherman Antitrust Act, such alleged violations being similar to the matters complained of in the present case, Civil Action No. 705. An order confirming this dismissal of the indictment and discharge of the defendants was duly entered by the Court under date of 7 April 1947. A copy of this order, marked Exhibit B, is attached hereto and is hereby incorporated as a part hereof.

4. No appeal was ever taken by the Government from the order dismissing the indictment. Although the desirability of having the Government obtain a final ruling from a higher Court on the question involved was informally suggested to counsel for the Government on more than one occasion by the Court, this affiant is informed and believes and therefore avers that the Department of Justice decided against claiming any appeal on the ground that the decision of this Honorable Court was correct. The basis of this information and belief is the statement made in open Court by Grant W. Kelleher, Special Assistant to the Attorney General, during the course of a colloquy at the hearing of 20 April 1948. Mr. Kelleher said in substance that the question of an appeal *et al non* by the Government from the order dismissing the indictment was carefully considered by the Department of Justice and that the decision of the Department was not to appeal, on the ground that the decision of this Honorable Court was correct.

5. Immediately following the conclusion of the hearing (on 19 March 1947) of the Motions to Dismiss the Indictment in Indictment No. 6055 and immediately after the decision granting said motions, there came on for hearing before this Honorable Court Motions for the Return of

Impounded Documents, which motions had been filed 358 in said cause by the defendants on 10 December 1946

(one motion by Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, respectively, and one motion by Novadel-Agene Corporation). Copies of these motions, marked, respectively, Exhibits B-1 and B-2, are attached hereto and are hereby incorporated as a part hereof. The documents in question had been produced by said parties under subpoenas issued by the Grand Jury in said Indictment No. 6055. There was oral argument by counsel for the movants and counsel for the Government on these motions. In the course of a colloquy during this argument, this Honorable Court said to Alfred Karsted, Esq., attorney for the Government (p. 95 of the transcript of the hearing of 19 March 1947): " * * * When there are documents that grow out of a Grand Jury process that has now been held to be an illegal Grand Jury, doesn't everything that belongs with it become tainted with that illegality?" At the conclusion of the hearing on these motions, the Court said (pp. 97, 98 of the transcript):

"The Court: All of those documents were obtained as a result of subpoenas issued at the instance of the Grand Jury which we have held to be an invalid Grand Jury. * * *

"The Court: There is no need of further discussion on this because the Court has already ruled the Grand Jury was illegally constituted. These papers were obtained as a result of subpoenas issued by an illegally constituted Grand Jury. Certainly defendants have a right to the return of their property under those circumstances. The motions for the return of the impounded documents are granted. * * *

An appropriate order was thereupon entered, directing that the documents be "made available to the defendants forthwith for return to them: * * *". A copy of said order, marked Exhibit C, is attached hereto and is hereby incorporated as a part hereof.

6. Said original documents referred to in said order (consisting of some two hundred thousand pages, more

or less) were delivered by the Government to the movants.

359 7. The Government, however, did not return to the movants a large number of photostat copies of such documents which they continued to retain in their possession. Such photostat copies were made by the Government while the originals were illegally and unconstitutionally in Providence, Rhode Island, pursuant to the aforesaid subpoenas and in consequence accessible to the representatives of the Department of Justice. Demands were made on 7 April 1947 and 2 May 1947, respectively, for the return of these photostat copies. The demands were not honored. Thereupon on 9 May 1947, two motions (one in behalf of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, respectively, and one in behalf of Novadel-Agene Corporation) were filed in this Court for the delivery to such defendants of said photostat copies (said motions at that time being docketed as "Misc. No. 5347," but now being docketed as part of the original "Indictment No. 6055"). An affidavit in support of said motions, by the present affiant, was filed. Copies of these motions, marked Exhibits D and E, respectively, are attached hereto and are hereby incorporated as a part hereof. A copy of the affidavit of this affiant in support of said motions, marked Exhibit F, is attached hereto and is hereby incorporated as a part hereof.

8. These motions were heard before this Honorable Court on 8 September 1947. The Government filed no affidavits in opposition to the motions and presented no evidence whatever in support of any proposition by way of defense to the motions.

9. Mr. Kelleher, attorney for the Government, stated in effect at the oral argument on the motions on 8 September 1947 that if the Government was not able to use the documents in question the Government's case would be "emasculated" and that the Government would be prevented
360 "from making any use or knowledge gained as a result of that unreasonable search." (The references in the ensuing quotations to the Information filed by the Government have to do with the Criminal Information No. 6070 filed on 1 May 1947 after the dismissal of Indictment No. 6055. The facts in regard to the institution of this criminal action and the filing by the defendants referred to in this affidavit of a motion to dismiss the Information,

to expunge certain portions of the Information; and to preclude the Government from using for any purpose whatever any information or evidence obtained from the illegally seized documents are set forth in detail in paragraphs 13 and 14, *infra*.) Mr. Kelleher said, among other things, the following (p. 90):

"Now it would be less than fair for me, your Honor, to try to imply that the indictment returned by the Grand Jury or the information filed by us is not based upon the documents in the case. Obviously, thousands of those documents were produced, many of them were submitted. *I would not assert for a minute that I could point out to your Honor what part of the information is based upon documentary evidence nor what part is based upon testimony or upon evidence obtained by the Government independent of the subpoenas. That is a matter, I submit, which we are not in a position to do.*" (Emphasis ours.)

A further portion of the colloquy and argument is as follows (pp. 91-92):

"MR. KELLEHER: I would like to mention that the portions of the information (i.e., the Criminal Information in No. 6070) to which the defendants refer are, as Mr. Tuttle has said, critical portions of the information. They embrace the greater part of the charge. *If defendants are right and if your Honor agrees with them, an order to expunge those portions of the information is certainly the equivalent of an order dismissing the information.*

"Furthermore, I might mention in closing that if your Honor grants their motion suppressing this documentary evidence, the net result is, in substance, that the Government's case is largely emasculated.

"THE COURT: What?

"MR. KELLEHER: Emasculated.

"THE COURT: That isn't the Court's concern, is it?

361 "MR. KELLEHER: I submit, your Honor, it may be your Honor's concern. I think it is rather important. After all, we have—

"THE COURT: I can't follow you on that, that the Government's case may be emasculated. That isn't the doings of the Court.

"MR. KELLEHER: It is the doings of the Court.

"THE COURT: The Court isn't here sitting to help the Government.

"Mr. KELLEHER: The point that I make concerning the information is simply this: To a large extent the question of whether the information should be stricken is an academic one if your Honor grants the motion to suppress the evidence because a motion to suppress the evidence, in effect, takes the case away from the Government." (Emphasis ours.)

10. On such a record and after such arguments, this Honorable Court, under date of 6 February 1948, handed down an opinion granting said motions for return of photostat copies of documents and directing that the photostats should be returned. A copy of the Court's opinion, marked Exhibit G, is attached hereto and is hereby incorporated as a part hereof.

11. On 18 February 1948, the Court entered an order on the foregoing opinion, directing that the photostats should be returned to the movants on or before 20 April 1948; a copy of this order, marked Exhibit H, is attached hereto and is hereby incorporated as a part hereof. A further order extending the time to 27 April 1948 for return of photostats was entered on 20 April 1948, after a hearing in which the Government submitted and argued a motion that the order of February 18, 1948 be stayed. A copy of the order extending the time to 27 April 1948, marked Exhibit I, is attached hereto and is hereby incorporated as a part hereof.

12. The Government claimed no appeal from the order of 19 March 1947 directing the return of the original documents. Notwithstanding the fact that more than thirty (30) days have elapsed since the order of 18 February 1948 362. on the motions for return of photostat copies of documents was entered, the Government has claimed no appeal from that order.

13. After Indictment No. 6055 was dismissed, the Government had on 1 May 1947 brought a new criminal action in this Honorable Court docketed as Criminal Information No. 6070. This information comprised the identical charges set forth in the previously dismissed indictment. The paragraphing of the information was the same as that of the indictment, and in general, except for such verbal changes as were made necessary by the fact that the proceeding was by information and not by indictment, the information was the same *verbatim* as the indictment.

14. Thereupon those defendants in the criminal proceedings whom this affiant represents, seasonably filed a motion

entitled "Motion to Dismiss the Information and to Preclude." A copy of this motion, marked Exhibit J, is attached hereto and is hereby incorporated as a part hereof. An affidavit in support of this motion was filed by Frederick G. Merckel. A copy of this affidavit, marked Exhibit K, is attached hereto and is hereby incorporated as a part hereof. The motion (Exhibit J) asked for the following forms of relief, in the alternative: (1) To dismiss the Information, (2) to expunge the portions of the Information which were based on information or evidence secured from illegally seized documents, and (3) to preclude the Government from using for any purpose whatever any information or evidence obtained from such illegally seized documents. The ground of the motion was that such documents had been seized in violation of the Fourth Amendment to the Constitution of the United States. Said motion was heard on 8 September 1947 by this Honorable Court.

363 15. On 14 April 1948, this Honorable Court handed down an opinion which in effect granted the motion to preclude, but otherwise denied the motion. A copy of this opinion, marked Exhibit L, is attached hereto and is hereby incorporated as a part hereof. An order on said opinion was entered by this Honorable Court on 20 April 1948. A copy of said order, marked Exhibit M, is attached hereto and is hereby incorporated as a part hereof. At the hearing in open Court on 20 April 1948 (of a motion by the Government to stay the operation of the order having to do with the return of photostats: namely, the order of 18 February 1948 in Indictment No. 6055), Grant W. Kelleher, Special Assistant to the Attorney General, in answer to certain questions by the Court, explained what the intentions of the Government were with respect to the present proceedings and the desire of the Government to make arrangements by which they would try to appeal certain of this Honorable Court's rulings to the Supreme Court of the United States. At the time of the signing and filing of this affidavit the transcript of the hearing of 20 April 1948 has not been completed, because the Court stenographer has been called out of town by illness in her family. This affiant, however, hopes to have, by the time that the motions are heard on 3 May 1948, a copy of said transcript and will file the same with this Court at that time or at some subsequent time subject to the Court's direction so as to make it a part of the record in this case, and for greater certainty as to the statements by Govern-

ment counsel hereby refers to said transcript and hereby incorporates said transcript as a part hereof, giving it the title "Exhibit N." From notes of the hearing and from recollection, however, the substance of Mr. Kelleher's state-

364 ment in this regard can be given. He said, in substance "The Government did not appeal from the order dismissing the indictment in the first criminal case. The Department of Justice concluded that the decision of this Court was correct and that it was best not to appeal. Moreover, the Government did not appeal from the order entered on the 19th day of March, 1947, ordering the return of the original documents. Neither did we appeal from the order entered on the 18th day of February 1948 directing the return of the photostats. We believed and still believe that it is not possible to appeal from that order. We are, however, anxious to appeal the question concerning the return of the documents to the Supreme Court of the United States. To that end our plan is as follows: That we shall present our two present motions, namely, to vacate the order for return of the photostats and for production of documents under Rule 34, these motions being filed in Civil Action No. 705. These motions will be heard on the 3d day of May 1948. At that time we anticipate that the Court will deny these two motions. The answer of the defendants then being filed, the case will be set down for trial. We shall probably then file a motion for a subpoena *duces tecum* for these same documents. We anticipate that this motion will be denied. We shall thereafter state to the Court that without the documentary evidence we are unable to proceed. It will then be suggested that a decree dismissing the complaint be entered. From this decree, we will appeal directly under the terms of the Antitrust Act to the Supreme Court of the United States and thereby endeavor to obtain a ruling on the correctness of this Court's ruling concerning the return of the documents." It will be understood that these statements by Government counsel did not occur in precisely this same order or without interruption, but this affiant, having been present at the argument, believes that the foregoing is a fair statement of Mr. Kelleher's remarks in this regard.

365 16. At the same hearing, Mr. Kelleher also earnestly requested that the Court should not enter the order, which in the end it did enter in Criminal Information No. 6070, with respect to its decision of 14 April 1948 on

the "Motion to Dismiss the Information and to Preclude." Mr. Kelleher stated that he did not think it possible to appeal from this order, but that by the time any adjudication on the question of the documents was obtained from the Supreme Court of the United States it might be too late to upset the order entered precluding the Government from using the documentary material in the new criminal case. (Criminal Information No. 6070). In the course of a long colloquy with the Court on this point, Mr. Kelleher said, in substance: "We cannot go ahead in this criminal case without the documents. The documents *are* our evidence in that case." The Court made certain remarks to the effect that it could not be sure that the Government did not have other evidence, but Mr. Kelleher stated in substance (as he had stated at the hearing on 8 September 1947 and as set forth above in this affidavit) that without the documentary evidence the criminal case could not proceed.

17. It appears from the foregoing that the decisions and orders of this Court effectively bar the Government from using the documentary material which was produced under illegal process and has been returned to the defendants (both original and photostats), in either the case at bar (Civil Action No. 705) or in Criminal Information No. 6070. It appears further that the Government has claimed no appeal from these orders. It appears further that the Government by the present motions is seeking to attack *collaterally* and in improper fashion the orders so entered.

366 For example, one of the motions to which this affidavit is addressed is a motion in the *civil* case to vacate an order entered in the *criminal* case. It appears further that the present motions are part of a plan or scheme to lay a fictitious basis for an alleged appeal to the Supreme Court of the United States, the plan embracing the further steps that the Government will ask this Court to enter a decree dismissing the civil complaint in the case at bar and will then seek to appeal from the decree so entered.

18. This affiant submits that the constitutional and other rights of the defendants are too fundamental to be the subject of such quixotic procedure and that the Government should either proceed in a proper and orderly manner or else frankly decline to prosecute this litigation further.

/s/ WILLIAM H. EDWARDS.

Subscribed and sworn to before me this 29th day of April 1948.

MARY R. MCGINN,
Notary Public.
(N.S.)

My Commission Expires June 30, 1951.

April 30, 1948.

Service of the above affidavit is hereby acknowledged.

GEORGE F. TROY, /s/
U. S. Attorney.

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Exhibit "A" to Affidavit

District Court of the United States for the
District of Rhode Island

Ind. 6055

UNITED STATES OF AMERICA

v.

WALLACE & TIERNAN CO., INC., ET ALS.

Ind. 6062

UNITED STATES OF AMERICA

v.

CHARLES J. EHRLICH, INC., a corporation doing business as
HARRISON FURNITURE COMPANY, ABRAHAM EHRLICH,
President, and JACOB GERSHOWITZ, alias Jacob
Gersh

Before His Honor, Judge Hartigan,
Wednesday, March 19, 1947

*Decision of the Court on Motions to Dismiss
Indictments*

369

Wednesday, March 19, 1947.

The Court: In the United States of America v. Wallace & Tiernan Co., Inc., et als., Indictment 6055, and the United States of America v. Charles J. Ehrlich, Inc., a corporation doing business as Harrison Furniture Company, Abraham Ehrlich, President, and Jacob Gershowitz, alias Jacob Gersh, Indictment 6062, the defendants have filed motions to dismiss the indictments. One of the grounds alleged by the defendants in each of these motions in substance is the intentional and deliberate exclusion of women from the lists from which were drawn the Special Grand Jury which returned Indictment 6055 on November 18,

1946, and the Grand Jury which returned Indictment 6062 on December 11, 1946.

In Indictment 6035 the parties have filed a stipulation of agreed facts with respect to the motions to dismiss the indictment as follows:

It is hereby stipulated by and between the plaintiff and each of the defendants herein, other than the defendant, Schütte & Koerting Company, as follows (this stipulation being a stipulation of agreed facts bearing upon the Motions to Dismiss the Indictment heretofore filed herein by each of the defendants herein, other than Schutte & Koerting Company):

1. The lists from which grand juries and petit juries (in both criminal and civil cases) have been and are drawn in the Superior Court for Providence and Bristol
370 Counties (with one exception, hereinafter noted, as to the City of Woonsocket in said Providence County) and for Newport County in the State of Rhode Island include women; and women have served on such juries in the following counties at all times since the following dates:

Providence and Bristol Counties—Since October, 1933.

Newport County—Since October, 1928.

(Paragraph Fourth (b) of the Wallace & Tiernan Company, Inc., Motion to Dismiss, hereinbefore referred to.)

Note: References to the paragraphs of the Motion to Dismiss the Indictment filed herein by the defendant Wallace & Tiernan Company, Inc., are inserted at the end of each paragraph of this stipulation for the sake of convenience of cross-reference.

2. Women do not serve and have never served on grand juries or on petit juries (in either criminal or civil cases) in the other two counties of the State, Kent County and Washington County, or on the Woonsocket calendar (which is for civil cases only) held in said City of Woonsocket, in Providence County, by reason of the fact that the Jury Commissioner has not certified to the Secretary of State, in accordance with Section 37 of Chapter 700 of the Public Laws of Rhode Island of its January, 1939, Session or prior statutes, that the accommodations and facilities of the Superior Court Houses in these three localities are such
371 as to allow of the service of women as jurors. (Paragraph Fourth (b) of the Motion to Dismiss.)

3. The Superior Court of the State of Rhode Island (sitting in its respective counties and sessions) is "the highest court of law," in which jurors serve within the meaning of Judicial Code, Sec. 275 (28 U. S. C. Sec. 411). (Paragraph Fourth (c) of the Motion to Dismiss.)

4. In the State Court less than five per cent. of the women who either receive questionnaires with respect to prospective jury duty or are so summoned seek to be excused because of their unwillingness or inability to serve. (Paragraph Fourth (c) of the Motion to Dismiss.)

5. Service of Women as jurors in the Superior Courts of said counties of the State of Rhode Island has been the matter of much public comment in the press in connection with the report of trials and otherwise. The fact of such service has been known at all times as a matter of fact by the Clerk of this Honorable Court and by the Jury Commissioner of said Court. (Paragraph Fourth (d) of the Motion to Dismiss.)

6. The population of the State of Rhode Island, according to the 1940 United States Census, is as follows by counties:

County	Population 1940 U. S. Census	Percentage of Total State Population (approx.)
Providence County	550,298	77.1 per cent.
Bristol County	25,548	3.6 " "
Newport County	46,696	6.6 " "
372 Kent County	58,311	8.1 " "
Washington County	32,493	4.6 " "
Total	713,346	100.0

(Paragraph Fourth (e) of the Motion to Dismiss.)

7. The counties in which women now serve, and have for many years served, on the grand juries and petit juries (in both criminal and civil cases) in the Superior Court of the State, namely, Providence, Bristol and Newport Counties, comprise approximately 87 per cent. of the total population of the State. The two largest cities of the State, Providence and Pawtucket, are both in Providence County and have the following population (1940 U. S. Census):

City of Providence	253,704
City of Pawtucket	75,797

and together comprise approximately 46 per cent. of the population of the State. The great preponderance of business done by the Superior Court of the State is done in

Providence County. Out of a normal complement of eleven Judges, nine sit regularly in Providence County. (Paragraph Fourth (c) of the Motion to Dismiss.)

8. The only certificates filed with the Secretary of State of the State of Rhode Island by the Jury Commissioner as aforesaid are as follows: a certificate filed on the 3rd day of October, 1927, with reference to the completion of the then new Superior Court House for Newport County, in which certificate there is no reference to accommodations and facilities for women jurors; and a certificate undated but filed the 11th day of September, 1941, and signed by the then Jury Commissioner of the State, certifying that the accommodations for women in the Superior Court House for the Counties of Providence and Bristol are suitable. (Paragraph Fourth (f) of the Motion to Dismiss.)

9. (a) All persons who served as grand jurors on the Special Grand Jury which returned the indictment herein were persons whose names were drawn from a box on the 15th day of April, 1946, by the Honorable William E. Reddy, Clerk of this Court, at a drawing held publicly and in open court for the purpose of drawing special grand jurors to serve in this Court. Said box from which said names were drawn was the box into which there had been previously placed for the purpose of said drawing the names of not less than three hundred persons purportedly possessing the qualifications prescribed by law for jurors serving on grand and petit juries in this Court, and all names which were in said box at the time of said drawing were names which had been placed therein as aforesaid prior to said drawing by said Clerk of this Court or his Deputy and by the Honorable Frederick B. Thurber, the Commissioner appointed for such purpose by this Honorable Court. (Paragraph Sixth (a) of the Motion to Dismiss.)

(b) In preparing for the drawing of the Special Grand Jury herein, the Clerk of this Court communicated with the Town Clerks of the following Towns in Rhode Island with respect to obtaining the names of possible jurors. In Providence County—East Providence and Lincoln; Newport County—Jamestown, Middletown, Little Compton and Tiverton; Kent County—East Greenwich and West Greenwich; Bristol County—Warren; Washington County—Exeter, Hopkinton and North Kingstown. Seven of these towns were in counties (Providence, Bristol, and Newport) where in the Superior Courts of

the State women now serve as jurors; and in addition the Special Grand Jury herein was drawn from residents of the City of Providence and the City of Pawtucket, both of which are in Providence County, where in the Superior Court of said State women serve as jurors. In his communication the Clerk of this Court, under date of the 7th day of December, 1945, addressed his request by circular letter to the Town Clerks of the Towns enumerated above as follows:

"For use in drawing a jury to serve at the approaching term of the United States District Court, a list of _____ male residents of your town qualified for jury service is needed, together with the occupation and post office address of each person.

"May I ask you to kindly mail to me a list not later than October 1." (Underlining ours.)

Varying numbers according to the population of the respective towns were inserted before the word "male" in said communication as aforesaid. (Paragraph Ninth (b) of the Motion to Dismiss.)

(c) When placing said names in said box from which on the 15th day of April, 1946, were drawn as aforesaid the names of all the persons who served on the Special Grand Jury which returned said indictment,

375 said Clerk and said Commissioner were in the office of said Clerk, and with them in said office at said time were lists of only male electors of the cities and towns aforesaid of said State and in the case of the towns aforesaid the lists were not complete lists of said male electors but were selected lists as requested in the communication set forth in the preceding paragraph. There were no lists of female electors of any town or city of said state in the office of said Clerk at said time. When said Clerk and said Commissioner were engaged in placing said names of not less than three hundred persons in said box as aforesaid, they each made a practice of selecting, and they did select, for the purpose of placing names in said box, only names taken from the aforesaid lists of male electors, and no other names from any other list or source, and they employed no other mode of selection than the mode of selection as above set forth, and each likewise then made a practice of not selecting for the purpose of placing names in said box as aforesaid any name of any female elector of said state, and said Clerk and said Commissioner while engaged as aforesaid did not place in said box any name of any female person whatsoever. No name of any female

person whatsoever was in said box at the time of said drawing. When said Clerk and said Commissioner were engaged as aforesaid in placing names in said box from which were to be drawn the names of grand jurors at the drawing which as aforesaid was held on the 15th day of April, 1946, the action of said Clerk and of said Commissioner in selecting and placing only names of male persons in said box and in not selecting and not placing in said box any name of any female elector of said state was intentional and deliberate. (Paragraph Ninth (c) of the Motion to Dismiss.)

(d) On all occasions down to and including the present time when under the provisions of Judicial Code, Sec. 276 (28 U. S. C. Sec. 412) said Clerk and said Commissioner have been engaged in the performance of their function of placing names in a box from which subsequently were to be drawn the names of jurors for service on grand juries and petit juries (in either criminal or civil cases) in said Court, said Clerk and said Commissioner have intentionally and deliberately made a practice of placing in such box the names of male electors only and of not placing in such box any name of any female person whatsoever. (Paragraph Ninth (d) of the Motion to Dismiss.)

(e) At the said time when names were being placed in said box from which on the 15th day of April, 1946, the names were drawn of all persons who served as grand jurors on the Special Grand Jury which returned the indictment herein, and at the times when the town councils and boards of canvassers of the towns and cities of said State prepared the lists of persons eligible to vote at the general election held in said State on the first Tuesday after the first Monday in November, 1944, and for a long time prior thereto and at all times subsequent thereto, there were within said State and within said District of Rhode Island many thousands of persons of the female sex who possessed in all respects the qualifications prescribed by law for service as jurors in the highest court of law in said State and in this Court, and large numbers of such female persons have regularly served and are now serving on grand juries and on petit juries (in both criminal and civil cases), in certain counties as aforesaid, in the Superior Court of said State at sessions held, respectively, for the Counties of Providence and Bristol and the County of Newport, as hereinbefore set forth. (Paragraph Ninth (e) of the Motion to Dismiss.)

(ff) At all times aforesaid the number of female persons residing in said State and in said District of Rhode Island was equal to or greater than the number of male persons residing therein; and at all times aforesaid the number of female persons who were qualified electors of the several towns and cities of said State was more than forty per cent. of the total number of qualified electors of the several towns and cities of said State; and at the time when said names were placed in said box from which on the 15th day of April, 1946, the names of said grand jurors were drawn, the number of female electors within said

State and said District who were twenty-five years 378 of age and over and who were in all respects qualified electors and who were liable to serve as jurors under Section 1 of Chapter 700 of the Public Laws of Rhode Island of the January, 1939, Session was in excess of sixty per cent. of the total number of male persons who at said time were likewise liable to serve as jurors as aforesaid and was in excess of thirty per cent. of the total number of persons who at such time were so liable to serve as jurors as aforesaid; and this was likewise the fact when on the 15th day of April, 1946, the names of said grand jurors were drawn from said box. No female person was summoned to serve on the Special Grand Jury which returned said indictment herein. (Paragraph NINTH (f) of the Motion to Dismiss.)

10. (a) Approximately 42 women are permanently employed in said building, and are divided between the offices and floors as follows:

First Floor—2

(Post Office facilities)

Money Order Section 1

Candy Stand Concession 1

Second Floor—15

(United States Attorney's Office, Grand Jury Room, Immigration and Naturalization, Postmaster's office, and other post office facilities)

United States Attorney's office 4

Immigration & Naturalization Service 7

Inspector of Naval Material 2

Postal Employees' Credit Union 3

Postal Cashier 1

Third Floor—6

(United States District Court, Clerk's Office, Judges' offices)

Clerk's office	2
Court Stenographer	1
United States District Judge	1
United States Circuit Judge	1
United States Marshal's Office	1

Fourth Floor—7

(Veterans' Administration, Coast Guard, U. S. Public Health, U. S. Secret Service, etc.)	
Veterans' Administration Loan Guarantee Div.	5
Coast Guard—Marine Inspection	2

Fifth Floor—12

(Department of Commerce, Department of Agriculture, Alcohol Tax Unit, etc.)	
Department of Commerce—Census Bureau (2 in office, approximately 8 enumerators)	10
Department of Agriculture—Alcohol Tax Unit	1
	1

Total (as estimated) 42

(Paragraph Tenth (a) of the Motion to Dismiss.)

(b) There are six toilets and washrooms in the building, used exclusively by women, and in at least one instance there is a retiring or rest room adjoining such toilet room. The details with respect to the toilet facilities used exclusively by women are as follows:

First Floor—1

Off Money Order Section	1
-------------------------	---

Second Floor—2

Hall facilities (three toilets and three wash-basins)

Off women's witness room, next to grand jury room

(No facilities off grand jury room, but another toilet off assistant attorney's office on other side of grand jury room is used by men. Also toilet off United States Attorney's room.)

Third Floor—1

Off District Court, Clerk's office
(Toilet rooms, two in number, for District Judge and Circuit Judge are adjacent in each case to their offices and their secretaries' offices.)

380

Fourth Floor—1

Off hall

1

Fifth Floor—1

Off hall, Room No. 510

1

TOTAL

6

(Paragraph Tenth (b) of the Motion to Dismiss.)

(c) In addition to the regular women employees in said building, a large number of women visit the building daily and stay either long or short periods of time in connection with transactions with the following: Post Office (particularly the Money Order Section therein); the United States Attorney's office; the Immigration and Naturalization Division of the Department of Justice; the United States District Court (which includes among its many other functions very extensive naturalization proceedings in this District); the Veterans' Administration; and other governmental units as set forth in the schedules given in sub-paragraphs "(a)" and "(d)" hereof. The Clerk of this Honorable Court has, as set forth above, two women on his staff, the United States District Judge (the Honorable John P. Hartigan) has a woman secretary, the United States Circuit Judge (the Honorable John C. Mahoney) has a woman secretary, and the United States Attorney (the Honorable George F. Troy) has four women secretaries—all of whom work permanently in said building on the second and third floors thereof. The second floor of said building contains the room or rooms where the grand juries of this Court ordinarily conduct their sessions, and the third floor contains the Court rooms where this Honorable Court sits. During the sessions of the Special Grand Jury herein, the Special Assistant to the Attorney General had in his office for a period of approximately six months three women secretaries whose permanent place of business was on the fifth floor of said building. (Paragraph Tenth (c) of the Motion to Dismiss.)

(d) The offices in said building, together with their present titles, are as follows:

First Floor

Post Office Facilities

U. S. Civil Service Local Secretary

Sec. N

Second Floor

Superintendent of Finance

203

Assistant Postmaster

204A

Postmaster	206
U. S. Naval Intelligence	207
U. S. Inspector of Naval Material	209
U. S. Immigration and Naturalization Service	212-218
Men Witnesses, Grand Jury	220
U. S. District Attorney	221
Grand Jury Room	222
Women Witnesses, Grand Jury	223

Third Floor.

Clerk, U. S. District Court	303
U. S. Marshal	305
United States District Judge	314
Court Rooms	
United States Circuit Judge	313

Fourth Floor.

U. S. Public Health Service	403-4
U. S. Secret Service	405
U. S. Coast Guard - Marine Inspection	409
U. S. Probation Office	411
U. S. Shipping Commissioner	414
Veterans Administration, Loan Guarantee Div.	416
Now vacant—to be part of Veterans Adm.	419

Fifth Floor.

U. S. Marine Corps Recruiting	501
U. S. Civil Service Examination Room	502
U. S. Alcohol Tax Unit	503A
Veterans Adm. Training Facilities	506
U. S. Food - Drug	508
U. S. Engineer Office	509
U. S. Dept. of Commerce	515
Bureau of Census	
Special Surveys Division	
U. S. Dept. of Agriculture	518
Farmers Home Adm.	
U. S. Coast Guard Hearing Room	519

(Paragraph Text in (d) of the Motion to Dismiss.)

(e) The building in question is 180 feet long and 124 feet wide, has five full stories (with an inside court) in addition to the basement. The building including the basement has approximately 128,504 square feet of floor space. The building was erected in the years 1905 to 1908, inclusive, and has been in active use since that time. (Paragraph Text in (e) of the Motion to Dismiss.)

(f) Immediately adjacent to the room where the Special Grand Jury herein conducted its sessions, a women's witness room or spare room (used in the Special Grand Jury's proceedings herein for impounded documents) off which there is a toilet and wash-room which is used by the four women secretaries of the United States Attorney's office. This fact was made known by the Government's attorney to the defendants' attorneys many months prior to the date of this motion, for it became necessary to allow to these women special access to the toilet room through the room where the impounded documents were kept despite provisions in the order of impounding closing the room to all except the Court and attorneys for the Government and attorneys for the parties who had produced the documents. The dimensions of the women's witness room (i. e., the room where the documents have been impounded) are approximately 28 feet by 12 feet (with an exclyusion of space in one corner) and comprising 284 square feet. The toilet room off said room is an entirely separate room and is approximately 7 feet square, and comprises 53 square feet. The larger toilet room on the same floor has 3 toilets and 3 wash-basins, and is approximately 22 feet by 9 feet in dimensions, and comprises 206 square feet. From this room to the Grand Jury room the distance is 132 feet. (Paragraph Tenth (f) of the Motion to Dismiss.)

(g) The room used for deliberations by the petit jury on the easterly end of the third floor is approximately 33½ feet by 18½ feet in dimensions, and comprises 634 square feet. At the south end of this petit jury room is a toilet and wash-room consisting of a separate room having two toilets, two urinals and two wash-basins. This toilet room is approximately 6 feet by 18½ feet in dimensions and comprises 112 square feet. Immediately adjacent to the present petit jury toilet room is a men's toilet room opening on the corridor, which room is 11 feet by 18½ feet in dimensions, comprises 199 square feet, and has three toilets, three urinals, and five wash-basins. (Paragraph Tenth (g) of the Motion to Dismiss.)

(h) The agreement as to facts embraced in the foregoing paragraph "40" (and its sub-paragraphs) is made without prejudice to the rights of the defendants under their reservation as to the materiality or relevancy of such facts as set forth in paragraph "Tenth" of the Motion to Dismiss the indictment filed by

Wallace & Tiernan Company, Inc., and in the corresponding paragraphs of other Motions to Dismiss filed herein.

11. The plans of the United States Post Office and Court House Building attached to this stipulation are true and correct plans of the building where this Honorable Court sits and where its Grand and Petit Juries hold their sessions.

12. This stipulation is not and does not purport to be, a complete or all-inclusive statement of the facts bearing on the Motions to Dismiss hereinbefore referred to, and does not, apart from two incidental references, deal in any manner with the applicable constitutional provisions, statutes, decisions, etc., of the United States or of the States, which bear on said Motions; and is entered into without prejudice to the right of any party hereto to present additional matter, either of fact or of law, bearing on said Motions to Dismiss.

13. Without restriction of the generality of the foregoing paragraph 12, any party hereto has the right to present additional evidence, whether by affidavit, deposition or sworn testimony, under the provisions of Rule 12 of the Federal Rules of Criminal Procedure or otherwise.

A stipulation has likewise been filed in the Ehrlich indictment.

385. Title 28, United States Code, Section 411, provides:

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Section 412 of the same Title provides the manner of drawing of jurors. Section 413 provides the apportionment in the district. Section 415 provides:

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color or previous condition of servitude."

Chapter 700 of the Public Laws of Rhode Island, passed in the January Session of 1939, Section 1, provides:

"All persons over twenty-five years of age who are qualified electors of any town or city shall be liable to serve as jurors."

I omit the rest of this section.

Section 2 provides:

"No citizen, possessing all other qualifications which are or shall be prescribed by law, shall be disqualified for service as a grand or petit juror in any court of this state on account of race, color or previous condition of servitude."

I omit the rest of that section.

386 Section 37 provides:

"Whenever the jury commissioner shall determine that the accommodations and facilities of the superior courthouse in any county are such as to allow of the service of women as jurors, he shall certify such fact to the secretary of state, and shall include women in the drawings made by him from the cities in such county and shall also direct the town council of each town in such county through the town clerk thereof, to include in the list of persons qualified to serve as jurors, required by the provisions of this chapter, the names of all women over twenty-five years of age who are qualified electors of such town, except such as would be exempted from service under the provisions of section 3 of this chapter, and the women whose names are included in such list shall be liable to serve as jurors in the superior court for such county, provided, however, that any woman whose name appears on such list who is unable or unwilling to serve as a juror, and shall so notify, over her signature, the jury commissioner or officer who summons her, shall be excused from such service."

In support of the motion of the defendants certain affidavits have been filed, made by reputable architects in this state, men of high standing in their profession, and also one made by Donald N. Hale, whose affidavit speaks of Federal Courts in Vermont and parts of New York where women serve on juries. The Government has not filed any affidavits in opposition to the defendants' motions to dismiss.

Attached to the affidavits are floor plans of the Grand Jury Room and rooms on the second floor on which the Grand Jury Room is located, and plans of the
387 Petit Jury Room and the floor space on the floor on which that room is located. The evidence shows that in the Grand Jury Room there are no toilet facilities connected with the Grand Jury Room but in a room to the south of the Grand Jury Room there is a room that has been referred to as "Women's Witness Room" in which there

are toilet facilities; and in a similar room just north of the Grand Jury Room marked, "Men Witnesses," there are similar toilet facilities. Likewise, on the northeast corner of the same floor there are toilet facilities for women, said facilities usually being used by employees of the Federal Government on that floor. These affidavits further show that on the floor on which the Petit Jury Room is located there are toilet facilities leading from the Petit Jury Room, said facilities usually being used by men jurors and that there are no other facilities for women on that third floor.

While the Court is of the opinion that the accommodations and facilities which I have outlined are not the best accommodations in this day and age that should be available for women called upon to perform the public duty of jury service, nevertheless, there are accommodations and facilities that could be used. There is also evidence here to the effect that for an expense estimated not to exceed \$1,000, toilet facilities could be provided for women in the Petit Jury

Room in that section which is directly over the toilet
388 facilities for women on the second floor which I have mentioned.

Since the decision of the Supreme Court in the case of *Ballard v. United States*, decided on December 9, 1946, this Court has been concerned with the method of drawing jurors in this District. The Court today has heard arguments presented by able counsel for the United States Government and the various defendants. It has also had the frank admission of counsel representing the United States Government on the possible outcome of this case should the matter ultimately reach the Supreme Court for decision in the event of the Court's denial of the defendants' motions to dismiss.

If the Court were to deny the motions to dismiss, it is most likely that each of these defendants would be subjected to the expense of a long trial. If a verdict of guilty were to be obtained by the Government, this question might arise again on a challenge to the array of a petit jury and great harm might come to the defendants under such circumstances.

The question raises sufficient doubt in the mind of the Court to resolve that doubt in favor of the defendants, especially in view of the decision in the *Ballard* case, which I have mentioned, and the decision of the Supreme Court in *Zap v. United States* on March 3rd of this year. As the Supreme Court said in the *Ballard* case—and I read from Page 7 of its opinion:

389 The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith v. Texas*, 311 U. S. 128, or an economic or social class, *Thiel v. Southern Pacific Co., supra*, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme.

Further down on said page:

"The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

The record in this case is that women in this state are equal to if not larger in number than men. It, therefore, seems that in the interest of justice this Court, in view of the Ballard and Zap cases, is in duty bound to grant the motions of the defendants in these cases. The defendants' motions to dismiss are granted, and it becomes unnecessary for the Court to consider other grounds alleged in the motions. The defendants are discharged and the bail is discharged.

390 I hereby certify that the foregoing, Pages 1 to 22 inclusive, is a true and accurate transcript, according to my stenographic notes.

s/ EUNICE J. ARCHAMBAULT,
Official Reporter.

391 Exhibit B to Affidavit
District Court of the United States
District of Rhode Island
Criminal Action No. 605

UNITED STATES OF AMERICA,

Plaintiff,

WALLACE & TIERNAN COMPANY, INC., ET AL.,

Defendant.

Order on Motions to Dismiss Indictments

This cause came on to be heard on the Motions to Dismiss the Indictment filed herein by the defendants, other than the defendant, Schutte & Koerting Company, and was

argued by counsel, and thereupon, upon consideration thereof, it is hereby ORDERED, ADJUDGED, and DECREED as follows, viz.:

1. That the indictments herein and the criminal action based thereon be, and they hereby are, dismissed;
2. That said defendants be, and they hereby are, discharged;
3. That the bail furnished by each of said defendants be and it hereby is discharged.

Entered as the order of Court this 7th day of April, 1947.

S. JOHN P. HARTIGAN,

U. S. D. J.

392 *Exhibit B to Affidavit (Supplement)*

In the District Court of the United States
For the District of Rhode Island

Criminal Action No. 6055

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WALLACE N. TIERMAN CO., INC., ET AL.

Defendants.

Order on Motion to Dismiss Indictment

In the matter of the application of Alfred Karsted, a duly authorized Attorney of the United States of America, praying for an order dismissing the indictment filed herein against the defendant Schutte & Koerting Company, this matter coming on before the Court in due form to be heard, upon the application of said Alfred Karsted, and it appearing to the Court:

1. That, on April 29, 1946, at the regular November, 1945 Term of this Court, a Special Grand Jury was impaneled, sworn and charged by this Court to inquire into various matters:

2. That on November 18, 1946, said Special Grand Jury returned an indictment charging eighteen defendants, among which Schutte & Koerting Company was one, with violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, (15 U. S. C.), commonly known as the Sherman Act:

3. That on or before January 24, 1947, all of said defendants except Schutte & Koerting Company moved to dismiss said indictment on the ground that said Special Grand Jury was illegally constituted in that women were

excluded from the panel from which said Grand Jury was drawn, in violation of the provisions of Judicial Code, Section 275 (28 U. S. C. Section 411):

4. That on March 19, 1947, this Court, after hearing argument on said motions and being fully advised in the premises, held that said Special Grand Jury was illegally constituted for the reasons set forth in said motions and held that said indictment should be dismissed as to said movants:

IT IS HEREBY ORDERED as follows, viz.:

1. That the indictment herein be, and the same hereby is, dismissed as to the defendant Schutte & Koerting Company.

2. That defendant Schutte & Koerting Company be, and it hereby is, discharged:

393 3. That the bail furnished by the said defendant Schutte & Koerting Company be, and it hereby is, discharged.

Done in open Court this 7th day of April, 1947.

BY THE COURT.

/s/ JOHN P. HARTIGAN.

United States District Judge.

394

Exhibit B-1 by Affidavit

District Court of the United States

District of Rhode Island

Criminal Action No. 6055

UNITED STATES OF AMERICA.

Plaintiff;

v.

WALLACE & TIERNAN COMPANY, INC., ET AL.,

Defendants;

Motion for Return of Impounded Documents, Etc.

Now come the defendants, Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, appearing specially for this purpose only, and move that all of the documents produced by them or any of them, in compliance with those certain subpoenas hereinafter listed and issued at the instance of the Special Grand Jury herein, be returned, or made available for return, forthwith, to the above-named defendants:

1. Subpoena dated April 29, 1946, addressed to Wallace & Tiernan Company, Inc.

2. Subpoena dated April 29, 1946, addressed to Wallace & Tiernan Products, Inc.

3. Subpoena dated April 29, 1946, addressed to Wallace & Tiernan Sales Corporation.

4. Subpoena dated August 26, 1946, addressed to Wallace & Tiernan Company, Inc.

5. Subpoena dated August 26, 1946, addressed to Wallace & Tiernan Products, Inc.

6. Subpoena dated August 26, 1946, addressed to Wallace & Tiernan Sales Corporation.

395 And the above named defendants further move

(a) that this Honorable Court vacate or modify the order of June 3, 1946, and the supplement thereto dated June 6, 1946, impounding said documents, insofar as said order and supplement affect the documents hereinbefore described and (b) that this Court grant such other relief to the above named defendants in the premises as may be just and appropriate.

By their Attorneys,

(sgd) WILLIAM H. EDWARDS,

(William H. Edwards)

(sgd) GERALD W. HARRINGTON,

(Gerald W. Harrington)

(sgd) EDWARDS & ANGELL,

(Edwards & Angell)

15 Westminster Street,

Providence 3, R. I.,

10 December 1946

Hon. George F. Troy,
United States District Attorney,
Post Office Building,
Providence, R. I.

PLEASE TAKE NOTICE that we have this day filed in the office of the Clerk of the United States District Court for the District of Rhode Island a motion whereof the foregoing is a true copy and that said motion will be in order for hearing on Monday, the 16th day of December, 1946, at 10:00 o'clock a. m.

(sgd) WILLIAM H. EDWARDS,

(William H. Edwards)

(sgd) GERALD W. HARRINGTON,

(Gerald W. Harrington)

(sgd) EDWARDS & ANGELL,

(Edwards & Angell)

396

Exhibit "B-2" to Affidavit
 District Court of the United States
 District of Rhode Island
 Criminal Action No. 6055
 UNITED STATES OF AMERICA

Plaintiff

vs.

WALLACE & TIERNAN COMPANY, INC., ET AL.

Defendants.

Motion for Return of Impounded Documents, Etc.

Now comes the defendant, Novadel-Agène Corporation, appearing specially for this purpose only, and moves that all of the documents produced by it in compliance with the subpoena dated August 26, 1946, and issued at the instance of the Special Grand Jury herein, be returned, or made available for return forthwith, to said Novadel-Agène Corporation.

And the said defendant further moves (a) that this Honorable Court vacate or modify the order of June 3, 1946, and the supplement thereto dated June 6, 1946, impounding said documents, insofar as said order and supplement affect the documents hereinbefore described and (b) that this Court grant such other relief to said Novadel-Agène Corporation in the premises as may be just and appropriate.

By its Attorneys,

/s/ EDWARD T. HOGAN.
 /s/ LAURENCE J. HOGAN.
 /s/ HOGAN & HOGAN.

397

December 10, 1946

Hon. George F. Troy,
 United States District Attorney,
 Post Office Building,
 Providence, R. I.

PLEASE TAKE NOTICE that we have this day filed in the office of the Clerk of the United States District Court for the District of Rhode Island a motion whereof the foregoing is a true copy and that said motion will be in order for hearing on Monday, the 16th day of December, 1946, at 10:00 o'clock A. M.

/s/ EDWARD T. HOGAN.
 /s/ LAURENCE J. HOGAN.
 /s/ HOGAN & HOGAN.

398

Exhibit "C" to Affidavit

District Court of the United States
District of Rhode Island

Criminal Action No. 6055

UNITED STATES OF AMERICA,

Plaintiff,

v.

WALLACE & TIERNAN COMPANY, INC., ET AL.,

*Defendants.**Order on Motion for Return of Impounded Documents*

This cause came on to be heard on the motions of the defendants, Wallace & Tiernan Company, Inc., *et al.*, and Novadel-Agene Corporation, *et al.*, respectively, for return of impounded documents, etc., and was argued by counsel, and thereupon, upon consideration thereof, it is hereby ORDERED:

1. That the documents listed in said motions be, and they hereby are, made available to the defendants forthwith for return to them;

2. That the orders of impounding described in said motions be, and they hereby are, vacated and rescinded.

Entered as the order of Court this 19th day of March, 1947.

(Sgd.) JOHN P. HARTIGAN,

United States District Judge;

March 19, 1947.

Approved as to form:

/s/ ALFRED KARSTED

399

Exhibit "D" to Affidavit

District Court of the United States
District of Rhode Island

Misc. No.

In the Matter of

Motion of WALLACE & TIERNAN COMPANY, INC., *et al.*,
for Return of Documents.

Motion for Return of Documents

Now come Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, (hereinafter called the movants) and on the affidavit of William H. Edwards, filed herein, move that

all photostat copies of the documents referred to in the "Order on Motion for Return of Impounded Documents" entered by this Honorable Court on the 19th day of March 1947, in Criminal Action No. 6055, be returned to the movants forthwith,—the movants hereby tendering (without admitting their legal obligation to do so) to the United States of America and its attorneys such sum of money as will fully reimburse the United States of America for its expenses in having said photostat copies made.

By their Attorneys,

/s/ WILLIAM H. EDWARDS,
GERALD W. HARRINGTON,
EDWARDS & ANGELL.

Hon. George F. Troy,
United States Attorney,
Federal Building,
Providence, R. I.

PLEASE TAKE NOTICE that we have this day filed a motion, whereof the foregoing is a true copy; that said proceeding is docketed in said Court as Misc. No. 5347; and that said motion will be assigned for hearing at such time as the Court may fix after consultation with the parties.

9 May 1947.

EDWARDS & ANGELL.

400

Exhibit "E" to Affidavit

District Court of the United States
District of Rhode Island

Misc. No. 5347

In the Matter of

Motion of WALLACE & TIERNAN COMPANY, INC., *et al.*,
for Return of Documents.

Motion for Return of Documents

Now comes Novadel-Agene Corporation (hereinafter called the movant) and, on the affidavit of William H. Edwards, filed herein, moves that all photostat copies of the documents referred to in the "Order on Motion for Return of Impounded Documents" entered by this Honorable Court on the 19th day of March 1947, in Criminal Action No. 6055, be returned to the movant forthwith,—the movant hereby tendering (without admitting its legal obligation to do so) to the United States of America and its attorneys

such sum of money as will fully reimburse the United States of America for its expenses in having said photostat copies made.

By its Attorneys,

s/ EDWARD T. HOGAN.
s/ LAURENCE J. HOGAN.
s/ HOGAN AND HOGAN.

315 Grosvenor Building,
Providence, Rhode Island.

401 Hon. George F. Troy,
United States Attorney,
Federal Building,
Providence, R. I.

PLEASE TAKE NOTICE that we have this day filed a motion, whereof the foregoing is a true copy; that said proceeding is docketed in said Court as Misc. No.; and that said motion will be assigned for hearing at such time as the Court may fix after consultation with the parties.

s/ EDWARD T. HOGAN.
s/ LAURENCE J. HOGAN.
s/ HOGAN AND HOGAN.

9 May 1947.
315 Grosvenor Building,
Providence, Rhode Island.

402

Exhibit "F" to Affidavit
District Court of the United States
District of Rhode Island
Misc. No.

In the Matter of
Motion of WALLACE & TIERNAN COMPANY, INC., et al.,
for Return of Documents

Affidavit of William H. Edwards

I, WILLIAM H. EDWARDS, of the City and County of Providence and State of Rhode Island, on oath make affidavit and say:

1. I attach hereto, marked Exhibit A and Exhibit B, respectively, and hereby incorporate as a part hereof, a letter dated 5 May 1947 from Edwards & Angell to Hon. George F. Troy and a letter dated 5 May 1947 from Hogan & Hogan to Hon. George F. Troy.

2. On 10 December 1946, there was filed in this Court, in Criminal Action No. 6055, two motions for return of impounded documents in behalf of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, and Novadel-Agene Corporation, respectively. These motions asked for the return of all documents produced by these companies or any of them in compliance with certain subpoenas issued at the instance of a Special Grand Jury which had returned an indictment in Criminal Action No. 6055, such subpoenas being listed in said motions.

3. On 19 March 1947, an order was entered in Criminal Action No. 6055, granting said motions and ordering the immediate return of the documents referred to in said motions.

4. To the affiant's knowledge, the attorneys and representatives of the United States of America have made a large number of photostat copies of said documents and still retain them, unlawfully and without justification, in their possession.

5. On 7 April 1947, the affiant made to Alfred Karsted, Esq., Special Attorney for the United States, an oral request for the return of such photostat copies. Again a similar oral request was made by the affiant to Mr. Karsted on 2 May 1947. The requests so made have not been complied with, and accordingly on 5 May 1947, the letters heretofore referred to as Exhibits A and B, respectively, were sent to the United States Attorney. It was also requested that an immediate reply be given to these letters. No definite reply, either by way of compliance or refusal, has been received by this date.

6. The affiant reserves the right to present additional evidence by way of affidavit or otherwise in support of the motions referred to above.

WILLIAM H. EDWARDS.

Subscribed and sworn to before me this 9th day of May 1947.

(Sgd) MARY R. MCGINN.
Notary Public.
(N.S.)

My Commission Expires June 30, 1951.

404- Exhibit "A" (Attached to Exhibit "F")

May 1947

Hon. George F. Troy,
United States Attorney,
Federal Building,
Providence 3, R. I.

Dear Sir:

In behalf of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, we hereby make formal demand upon you for the immediate return to us of all photostat copies of the documents referred to in the "Order on Motion for Return of Impounded Documents" entered by the United States District Court for the District of Rhode Island on 19 March 1947, in Criminal Action No. 6055.

We have already made a similar oral request on two previous occasions, on 7 April 1947 and 3 May 1947, respectively. These requests were directed to Alfred Karsted, Esq., Special Attorney for the United States.

Inasmuch as these requests have not been complied with to date, we respectfully request that you advise us of your intentions in this regard by return mail, so that in the event that you refuse to return these documents we may promptly institute proceedings for their return.

In connection with this demand we hereby offer and tender to you (although we deem ourselves under no legal obligation to do so) such sum of money as will fully reimburse the United States of America for its expenses in having said photostat copies made.

We should add a word concerning the original documents ordered returned by the Court decree of 19 March 1947, referred to above. A large quantity of these documents was removed into our possession on the evening of 19 March. When the lists were checked, however, it was found that a large number of files and documents was missing. We made demand upon government counsel for these on 7 April 1947 (the same date on which the first demand for the photostat copies was made). The files purporting to contain these missing documents were returned to us later in April and are now being checked for completeness.

Yours respectfully,

EDWARDS & ANGELL
by WILLIAM H. EDWARDS
Attorneys for Wallace & Tiernan
Company, Inc., as aforesaid.

May 5, 1947

Hon. George F. Troy,
United States Attorney,
Federal Building,
Providence 3, R. I.

Dear Sir:

In behalf of Novadel-Agene Corporation, we hereby make formal demand upon you for the immediate return to us of all photostat copies of the documents referred to in the "Order on Motion for Return of Impounded Documents" entered by the United States District Court for the District of Rhode Island on 19 March 1947, in Criminal Action No. 6055.

We have already made a similar oral request on two previous occasions, on 7 April 1947 and 2 May 1947, respectively. These requests were directed to Alfred Karsted, Esq., Special Attorney for the United States.

Inasmuch as these requests have not been complied with to date, we respectfully request that you advise us of your intentions in this regard by return mail, so that in the event that you refuse to return these documents we may promptly institute proceedings for their return.

In connection with this demand we hereby offer and tender to you (although we deem ourselves under no legal obligation to do so) such sum of money as will fully reimburse the United States of America for its expenses in having said photostat copies made.

We should add a word concerning the original documents ordered returned by the Court Decree of 19 March 1947, referred to above. A large quantity of these documents was removed into our possession on the evening of 19 March. When the lists were checked, however, it was found that a large number of files and documents was missing. We made demand upon government counsel for these on 7 April 1947 (the same date on which the first demand for the photostat copies was made). The files purporting to contain these missing documents were returned to us later in April and are now being checked for completeness.

Yours respectfully,

(sgd) EDWARD T. HOGAN

LAURENCE J. HOGAN

HOGAN & HOGAN

Attorneys for Novadel-Agene Corporation.

Exhibit "G" to Affidavit

District Court of the United States
For the District of Rhode Island

Indictment No. 6055

In the Matter of
Motions of WALLACE & TIERNAN COMPANY, INC., et al
for Return of Documents

Opinion—February 6, 1948.

HARTIGAN, J. This matter was heard on the motions of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and Novadel-Agene Corporation and on the affidavit of William
407 H. Edwards, Esq., filed May 9, 1947, "that all photostat copies of documents referred to in the 'Order on Motion for Return of Impounded Documents' entered by this Honorable Court on the 19th day of March, 1947, in Criminal Action number 6055 be returned to the movants forthwith."

The affidavit of Mr. Edwards sets forth in substance that on December 10, 1946, there was filed in this Court in Indictment No. 6055, two motions for return of impounded documents in behalf of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation and Novadel-Agene Corporation, which asked for the return of all documents produced by these companies in compliance with certain subpoenas issued at the instance of the grand jury which had returned Indictment No. 6055, such subpoenas being listed in said motions.

The affidavit further sets forth that on March 19, 1947, an order was entered in Indictment No. 6055 granting said motions and ordered the immediate return of the documents referred to in said motions.

The affidavit further alleges that to the affiant's knowledge the attorneys and representatives of the United States of America have made a large number of photostat copies of said documents and still retain them, unlawfully
408 and without justification, in their possession; that on February 7, 1947, the affiant made to Aldred Karsted, Esq., Special Attorney for the United States, an oral request for the return of such photostat copies and again a similar request was made May 2, 1947. The requests so made had not been complied with and, accordingly, on May 5, 1947, letters from the attorneys for the Wallace & Tiernan Companies and Novadel-Agene Corporation

were sent to the United States Attorney for this District making formal demand for the immediate return of all photostat copies and that no definite reply, either by way of compliance or refusal, has been received.

The Government has filed no counter-affidavit.

The "Order on Motion for Return of Impounded Documents" entered March 19, 1947, is as follows:

"This cause came on to be heard on the motions of the defendants, Wallace & Tiernan Company, Inc., *et al.*, and Novadel-Agene Corporation, *et al.*, respectively, for return of impounded documents, etc., and was argued by counsel, and thereupon, upon consideration thereof, it is hereby ORDERED:

409 "1. That the documents listed in said motions be, and they hereby are, made available to the defendants forthwith for return to them;

"2. That the orders of impounding described in said motions be, and they hereby are, vacated and rescinded."

April 30, 1946, a grand jury was impaneled in this district. On the same date subpoenas *duces tecum* were issued to Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation.

Motions to quash all of the subpoenas were filed on the ground, among others, that the subpoenas constituted an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States.

May 22, 1946, after hearing and argument, the motions to quash were denied.

September 6, 1946, subpoenas *duces tecum* were issued to Novadel-Agene Corporation, Industrial Appliance Corporation and the three Wallace & Tiernan Companies. Motions to quash these subpoenas were also filed. However, a satisfactory compliance with the subpoenas was worked out by negotiation between attorneys for the Government and the corporations. Pursuant to the subpoenas, documents were produced by the movants and were im-
410 ponded by the Court upon application by the Government:

November 18, 1946, the grand jury returned an Indictment No. 6055, charging eighteen defendants, including the movants, with violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, commonly known as the Sherman Act.

December 10, 1946, the movants filed a motion for the return of the impounded documents.

December 21, 1946, the defendants (except Schutte & Koerting Company) in said indictment moved to dismiss the indictment on the ground, among others, that the grand jury was illegally constituted in that women were intentionally, arbitrarily and entirely excluded from the panel from which the grand jury was drawn.

March 19, 1947, the Court, after hearing argument on the motions to dismiss, held that the grand jury was illegally constituted and that said indictment should be dismissed and an order to that effect was entered April 7, 1947..

April 1, 1947, the Government filed a motion to dismiss the indictment as against Schutte & Koerting Company and the motion was granted.

The Government did not appeal the Court's decision dismissing the indictment and ordering the return of the impounded documents.

The Government now objects to the return of all
411 photostat copies made by it of the documents referred to in the order of March 19, 1947.

It is the Government's contention that a subpoena being a distinct and separate process of the court, is not rendered illegal by the fact that the grand jury for whose consideration the documents were subpoenaed, was an illegally constituted grand jury.

The Government in its brief states: "Since subpoenas constitute but a 'figurative' search and seizure, the question of whether they ever constitute an unreasonable search and seizure under any conditions requires a balancing of the public interest against private security." In support of this they cite *Okla. Press Pub. Co. v. Walling*, 327 U. S. 186.

It seems to me that the *Okla. Press Pub. Co.* case is not analogous to the instant case. There the Supreme Court said at p. 210: "All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it." The authorized inquiry referred to investigations conducted by the Administrator pursuant to § 1(a) of the Fair Labor Standards Act, 52 Stat. 1060.

The subpoenas *duces tecum* in the instant matter commanded the movants to appear before the grand jury on a day certain and bring with them and produce certain
412 records and then and there to testify concerning certain matters under investigation by the grand jury and not depart the court without leave thereof or of the United States.

The appearance of the witness and the production of the records in response to such subpoenas cannot be said to be voluntary when failure to appear would subject him to punishment.

The cases are too numerous to cite that hold that either actual force or legal compulsion may constitute unreasonable search and seizure.

The subpoenas did not violate the Fourth Amendment and the Government was entitled to have the documents produced for presentation to a legal grand jury. It seems to me that when the grand jury turned out to be illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment:

"The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

There is nothing in the record that convinces me that the movants in their role as witnesses or defendants waived any of their rights. As witnesses they contested the subpoenas and contended that they violated the Fourth Amendment and when they became defendants they made timely objection to the legality of the grand jury.

I find nothing in the record that indicates that the movants gave permission to the Government's representatives to make photostat copies of the documents which were produced in compliance with the subpoenas.

In *Johnson v. United States*, decided February 2, 1948, (16 L. W. 4133, 4135), the Supreme Court said:

"Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which the personalities must then have some valid basis in law for the intrusion. Any other rule would undermine the right of the people to be secure in their persons, houses, papers and effects, and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

It is my opinion that the Government, gaining access to the documents by means of an illegal grand jury, has no valid basis in law for the intrusion, which the Government committed in making the photostats of said documents and retaining possession of them.

The motions, therefore, are granted.

Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment.

414

Exhibit "H" to Affidavit

District Court of the United States
District of Rhode Island

Indictment No. 6055

UNITED STATES OF AMERICA,

Plaintiff

v.

WALLACE & TIERNAN CO., INC., ET AL.,

Defendants.

Order on Motion for Return of Photostat Copies of Documents

This cause came on to be heard on the motion of the defendants, Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation (filed herein on the 9th day of May 1947) and on the motion of Novadel-Agene Corporation (filed herein on the 9th day of May 1947), respectively, for return of photostat copies of documents described in said motions, and was argued by counsel, and, thereupon, upon consideration thereof, it is hereby ORDERED:

That the photostat copies of documents described in the aforesaid motions (being in turn the documents described in the order entered by this Honorable Court on the 19th day of March 1947, entitled "Order on Motion[s] For return of Impounded Documents," and further described in the two Motions for Return of Documents filed herein by the aforementioned parties on the 10th day of December on or before April 20, 1948,

1946) shall be returned forthwith to the movants' attorneys: Edwards & Angell, 15 Westminster Street, Providence, Rhode Island, and Hogan & Hogan, Grosvenor Building, Providence, Rhode Island, respectively.

Entered as the decree of Court this 18th day of February, 1948.

(Sgd) JOHN P. HARTIGAN,
United States District Judge.

Wm H E
as to form

GWK
H&H-RAC
as to form

Exhibit "I" to Affidavit

District Court of the United States
District of Rhode Island

Indictment No. 6555

UNITED STATES OF AMERICA,

v. c.

WALLACE & TIERNAN COMPANY, INC., ET AL.

Order on "Motion to Stay Orders"

The above entitled cause came on to be heard on the motion of the United States of America filed herein on the 14th day of April 1948 to stay the orders entered in this cause on February 18, 1948, March 4, 1948, and April 5, 1948, and was argued by counsel, and thereupon, upon consideration thereof, it is hereby ORDERED, ADJUDGED and DECREED as follows:

FIRST. That said motion be and it hereby is denied.

SECOND. That the orders of February 18, 1948, March 4, 1948, and April 5, 1948, be amended in one respect, viz.: that the date on or before which the documents referred to in said orders are to be returned by the Government shall be changed to read April 27, 1948 in the place and stead of April 20, 1948.

THIRD. That as to the documents covered by the motions of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, respectively, and of Novadel-Agene Corporation, said documents shall be returned on or before April 27, 1948, to the office of Edwards & Angell, 15 Westminster Street, Providence, Rhode Island (Hogan & Hogan, Attorneys for Novadel-Agene Corporation, assenting to the delivery of the documents of Novadel-Agene Corporation to that address).

416 FOURTH. That the documents covered by the order of March 4, 1948, shall be returned on or before April 27, 1948, to the office of Tillinghast, Collins & Tanner, Hospital Trust Building, Providence, Rhode Island.

FIFTH. That the documents covered by the orders of April 5, 1948, shall be returned on or before April 27, 1948, to the office of Hinekley, Allen Tillinghast & Wheeler, Industrial Trust Building, Providence, Rhode Island.

SIXTH. That in each instance the Government, if it so desires, shall prepare a receipt to be signed by the attorneys for the respective movants.

Entered as the decree of Court this 20th day of April,
1948.

(Sgd.) JOHN P. HARTIGAN
United States District Judge

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Exhibit "J" to Affidavit

In the District Court of the United States
for the District of Rhode Island

Criminal Action No. 6070

(15 U. S. C. §§ 1, 2)

UNITED STATES OF AMERICA,

Plaintiff,

against

WALLACE & TIERNAN COMPANY, INC., *et al.*

Defendants.

*Motion to Dismiss the Information
and to Preclude*

Now come the defendants, Wallace & Tiernan Company, Inc.; Wallace & Tiernan Products, Inc.; Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, Industrial Appliance Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck, and each separately moves herein for the following relief:

1. An order dismissing as to each defendant separately the Information herein.
2. In the alternative, an order dismissing and expunging as to each defendant separately those portions of the Information filed herein which reproduce or are based on information obtained from the papers and documents illegally and unconstitutionally taken and seized from the possession of certain of the moving defendants, as set forth in the annexed affidavit of Frederick G. Merekel, verified July 22, 1947.
3. An order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents.

418

4. An order granting to the moving defendants and to each of them separately such other and further relief as may be just.

By their Attorneys,

S. WILLIAM H. EDWARDS,
S. GERALD W. HARRINGTON;
S. JOHN V. KEAN,
S. EDWARDS & ANGELL,

*Edwards & Angell, in behalf of
Wallace & Tiernan Company, Inc.,
Wallace & Tiernan Products, Inc.,
Wallace & Tiernan Sales Corporation,
Martin F. Tiernan, William J. Orchard,
Gerald D. Peet, Harold S. Hutton,
Vincent Visani and Cornelius F. Scheuck.*

S. LAURENCE J. HOGAN,
S. HOGAN AND HOGAN,
*Hogan & Hogan in behalf of Noradel
Appliance Corporation and Industrial
Appliance Corporation.*

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Notice of Motion

25 July 1947

Hon. George F. Troy,
United States Attorney,
Federal Building,
Providence, R. I.

Please take notice that we have this day filed in the Office of the Clerk of the United States District Court for the District of Rhode Island a motion (and annexed affidavit of Frederick G. Mefckel) whereof the foregoing is a true copy, and that said motion will be in order for hearing before said Court (in accordance with the understanding hitherto arrived at between the parties and approved by the Court) upon the 8th day of September 1947. In accordance with the request of your office, an additional true copy of this motion is also served upon you herewith, for the use of other government counsel.

EDWARDS & ANGELL,
HOGAN & HOGAN,
*Attorney for the Defendants,
as aforesaid.*

Exhibit "K" to Affidavit

In the District Court of the United States
For the District of Rhode Island

Criminal Action No. 6070
(15 U. S. C. §§ 1, 2)

UNITED STATES OF AMERICA,

Plaintiff,

against,

WALLACE & TIERNAN COMPANY, INC., *et al.*,

Defendants.

State of New York, {
County of New York. { ss.:

FREDERICK G. MERCKEL, being duly sworn, says:

I am employed by the corporate defendants named herein (other than Builders Iron Foundry, Fairbanks, Morse & Company, Hellige, Inc., and Schutte & Koerting Company) in the capacity of Executive Assistant, and have been for over fifteen years.

During the year 1946 an alleged special grand jury in the District Court of the United States, for the District of Rhode Island, issued what purported to be subpoenas *duces tecum* to Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, requiring the production of a very large number of documents before such special grand jury. Under compulsion of such subpoenas, these documents were produced in obedience to the subpoenas; and they comprised over 200,000 separate pages.

Subsequently, this special grand jury returned an indictment and criminal action No. 6055 against these moving parties and other parties. Thereafter these moving parties

made a motion in criminal action No. 6055 for the dismissal of such indictment on the ground that such special grand jury was not legally organized and that the indictment which it purported to find did not constitute due and constitutional process. These moving parties also filed a motion in criminal action No. 6055 for the return of the documents produced by them or any of them under compulsion of such subpoenas.

The motion for the dismissal of the indictment was granted; and on March 10, 1947, an order was entered in criminal action No. 6055, ordering the immediate return of the docu-

ments taken and seized pursuant to the aforesaid subpoenas. This order was thereupon complied with by the United States, except that the United States did not return the photostatic copies taken by it of certain of such documents. A motion by certain of these moving parties for the delivery to them of such photostatic copies is now pending in this Court.

This deponent now refers to and makes part of the record of the present motion the notices of the aforesaid motion for the dismissal of the indictment and the papers filed as part of the record thereof and the notice of the aforesaid motion for the return of the aforesaid taken and seized papers and documents and the papers filed as part of the record thereof and the order of this Court, dated March 19, 1947, dismissing the aforesaid indictment and the order of this Court, dated March 19, 1947, granting the motion for the return of the aforesaid taken and seized papers and documents.

Subsequently, on May 1, 1947, the United States filed in this Court a so-called "Information" by the Attorney General of the United States against the same corporations and individuals who were listed as defendants in the aforesaid indictment. This Information is the same verbatim as the aforesaid indictment except for such verbal changes as were made necessary by the fact that it was an
422 Information and not an indictment. The paragraphing is the same.

The aforesaid papers and documents taken and seized as aforesaid, pursuant to the aforesaid subpoenas, were impounded on motion of the United States by order of this Court, dated June 3, 1946; and this deponent refers to such order and makes the same part of the record of the present motion.

While the said papers and documents were so impounded and in the possession of the United States and under examination by the Department of Justice of the United States, the Department of Justice made photostatic copies of a large number of such papers and documents and also placed before the special grand jury as exhibits or as evidence for its consideration a great number of such documents; and the contents thereof were, as references and statements in the aforesaid indictment show, considered and utilized by the special grand jury in the finding and framing of the indictment and by the Department of Justice in presenting the case before the special grand jury. For its purposes in

so presenting such case and for making copies for its use at the trial of such indictment and for further investigation, the United States photostated 7,121 of the aforesaid documents; and still has such photostatic copies in its possession.

The aforesaid Information, filed May 1, 1947, likewise utilizes, incorporates and refers to the aforesaid documents and even designates some of them in the body of the Information itself.

Without intending limitation but solely by way of illustration, this deponent cites the following instances in the Information of allegations utilizing and placing construction by the United States upon information contained in the aforesaid documents: the allegations in paragraphs 27, 28, 29, 32, 33, 34, 35, 36, 37 and 38, among others.

The Information, taken as a whole, represents and expresses charges and conclusions which the United States makes with the support, as it contends, of the aforesaid taken and seized papers and documents.

By reason of the foregoing, the moving defendants separately pray for the reliefs asked for in the notice of motion.

FREDERICK G. MERCKEL

Sworn to before me this 22nd day of July, 1947.

DONALD L. PRICE,

Notary Public in the State of New York,
Residing in Kings County.

Kings Co. Clk's No. 219, Reg. No. 339-P-8.

N. Y. Co. Clk's No. 524, Reg. No. 472-P-8.

Queens Co. Clk's No. 859, Reg. No. 208-P-8.

Certificate filed in Westchester County.

Commission Expires March 30, 1948.

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Exhibit "L" to Affidavit

District Court of the United States

For the District of Rhode Island

Criminal Information No. 6070

UNITED STATES OF AMERICA,

v.

WALLACE & TIERNAN COMPANY, INC., et al.

Opinion—April 14, 1948

HARTIGAN, J. This matter was heard on the motion of Wallace & Tiernan Company, Inc., Wallace & Tiernan

Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, Industrial Appliance Corporation, Martin F. Tiernan, William J. Orchard, 425 Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius Schenck, and each separately moves for the following relief:

1. An order dismissing as to each defendant separately the information herein.

2. In the alternative, an order dismissing and expunging as to each defendant separately those portions of the information filed herein which reproduce or are based on information obtained from the papers and documents illegally and unconstitutionally taken and seized from the possession of certain of the moving defendants, as set forth in the annexed affidavit of Frederick G. Merckel, verified July 22, 1947.

3. An order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents.

4. An order granting to the moving defendants and each of them separately such other and further relief as may be just.

426 The said affidavit of Merckel is as follows:

"I am employed by the corporate defendants named herein (other than Builders Iron Foundry, Fairbanks, Morse & Company, Hellige, Inc., and Schutte & Koerting Company) in the capacity of Executive Assistant, and have been for over fifteen years.

"During the year 1946 an alleged special grand jury in the District Court of the United States, for the District of Rhode Island, issued what purported to be subpoenas *duces tecum* to Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, requiring the production of a very large number of documents before such special grand jury. Under compulsion of such subpoenas, these documents were produced in obedience to the subpoenas; and they comprised over 200,000 separate pages.

"Subsequently, this special grand jury returned an indictment in criminal action No. 6055 against these moving parties and other parties. Thereafter these moving parties made a motion in criminal action No. 6055 for the dismissal of such indictment on the

427 ground that such special grand jury was not legally organized and that the indictment which it purported to find did not constitute due and constitutional process. These moving parties also filed a motion in criminal action No. 6055 for the return of the documents produced by them or any of them under compulsion of such subpoenas.

"The motion for the dismissal of the indictment was granted; and on March 19, 1947, an order was entered in criminal action No. 6055, ordering the immediate return of the documents taken and seized pursuant to the aforesaid subpoenas. This order was thereupon complied with by the United States, except that the United States did not return the photostatic copies taken by it of certain of such documents. A motion by certain of these moving parties for the delivery to them of such photostatic copies is now pending in this Court.

"This deponent now refers to and makes part of the record of the present motion the notices of the aforesaid motion for the dismissal of the indictment and the papers filed as part of the record thereof and the notice of the aforesaid motion for the return of the
428 aforesaid taken and seized papers and documents and the papers filed as part of the record thereof and the order of this Court, dated March 19, 1947, dismissing the aforesaid indictment and the order of this Court, dated March 19, 1947, granting the motion for the return of the aforesaid taken and seized papers and documents.

"Subsequently, on May 1, 1947, the United States filed in this Court a so-called 'Information' by the Attorney General of the United States against the same corporations and individuals who were listed as defendants in the aforesaid indictments. This Information is the same verbatim as the aforesaid indictment except for such verbal changes as were made necessary by the fact that it was an Information and not an indictment. The paragraphing is the same.

"The aforesaid papers and documents taken and seized as aforesaid, pursuant to the aforesaid subpoenas, were impounded on motion of the United States by order of this Court, dated June 3, 1946; and this deponent refers to such order and makes the same part of the record of the present motion.

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"While the said papers and documents were so impounded and in the possession of the United States and under examination by the Department of Justice of the United States, the Department of Justice made photostatic copies of a large number of such papers and documents and also placed before the special grand jury as exhibits or as evidence for its consideration a great number of such documents; and the contents thereof were, as references and statements in the aforesaid indictment show, considered and utilized by the special grand jury in the finding and framing of the indictment and by the Department of Justice in presenting the case before the special grand jury. For its purposes in so presenting such case and for making copies for its use at the trial of such indictment and for further investigation, the United States photostated 7,121 of the aforesaid documents; and still has such photostatic copies in its possession.

"The aforesaid Information, filed May 1, 1947, likewise utilizes, incorporates and refers to the aforesaid documents and even designates some of them in the body of the Information itself.

430

"Without intending limitation but solely by way of illustration, this deponent cites the following instances in the Information of allegations utilizing and placing construction by the United States upon information contained in the aforesaid documents; the allegations in paragraphs 27, 28, 29, 32, 33, 34, 35, 36, 37 and 38, among others.

"The Information, taken as a whole, represents and expresses charges and conclusions which the United States makes with the support, as it contends, of the aforesaid taken and seized papers and documents."

The Court filed an opinion February 6, 1948, granting the motion of certain of the defendants for the delivery to them of such photostatic copies of the documents referred to in Merkel's affidavit.

No documents were obtained from the individual defendants but only from the corporate movants.

In *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631, 636, (Cert. Den. 67 S. Ct. 49) the Court said:

"These and other issues were considered by the District Court on motion before trial and disposed of in a careful and discriminating opinion reported in 53 F. Supp. 870. As a matter of fact, the court did order

the return of papers seized in Antonelli's house; and they are not involved here. And the Court correctly pointed out that as to corporate papers the right to object was available only to the corporation. *United States v. DeVasto*, 2 Cir., 52 F. 2d 26, 29, 78 A.L. R. 336, certiorari denied *DeVasto v. United States*, 284 U. S. 678, 52 S. Ct. 138, 76 L. Ed. 573. * * *

434. Granting that the information is almost verbatim with the indictment which has been dismissed, the Court at this stage of the proceedings cannot say that the Government may not be able to obtain evidence in support of the allegations in the information from other sources than documents which have been ordered returned.

In *Nardone v. United States*, 308 U. S. 338, 341, the court said:

"Here, as in the *Silverthorne* case, the facts improperly obtained do not become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others; but the knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively. 251 U. S. 385, 392."

The Court's opinion of February 6, 1948, is controlling as to paragraph 3 of the motion.

The motion to dismiss the information and to preclude is denied.

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Exhibit "M" to Affidavit

District Court of the United States

District of Rhode Island

Criminal Action #6070

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WALLACE & TIERNAN COMPANY, INC., *Et Al.*, DEFENDANTS.

ORDER ON OPINION OF APRIL 14, 1948, WITH RESPECT TO

"MOTION TO DISMISS THE INFORMATION AND TO
PRECLUDE"

The above entitled cause came on to be heard on the motion of certain defendants filed herein on the 25th day of July 1947 entitled "Motion to Dismiss the Information and to Preclude" and was argued by counsel and thereupon, upon consideration thereof, the Court having rendered an opinion herein under date of April 14, 1948, it is hereby ORDERED, ADJUDGED and DECREED as follows, viz.:

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FIRST. That the opinion of the Court dated the 6th day of February 1948 in Indictment No. 6055 is hereby declared to be controlling as to paragraph "3" of said "Motion to Dismiss the Information and to Preclude," said paragraph "3" reading as follows: "3. An order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents."

SECOND. That otherwise the motion to Dismiss the Information and to Expunge be and it hereby is denied.

Entered as the decree of Court this 20th day of April 1948.

s/ JOHN P. HARTIGAN
United States District Judge

433

Exhibit "N" to Affidavit

District Court of the United States
For the District of Rhode Island

Ind. No. 6055

C. I. No. 6070

UNITED STATES OF AMERICA,

v.

WALLACE & TIERNAN Co., Inc., *Et Al.*

Before His Honor, Judge Hartigan, Tuesday, April, 20, 1948.

APPEARANCES:

For the GOVERNMENT: Grant W. Kelleher, Esq., Special Assistant to the Attorney General. Alfred Karsted, Esq., Special Attorney.

For the DEFENDANTS: Wallace & Tiernan, Charles H. Tuttle, Esq., of the New York Bar; Edwards & Angell; William H. Edwards, Esq., Gerald W. Harrington, Esq., and John V. Kean, Esq., appearing.

Novadel-Agene Corporation, Industrial Appliance Corporation. Hogan & Hogan; Laurence J. Hogan, Esq., appearing.

Builders Iron Foundry, Proportioneers, Inc. Hinckley, Allen, Tillinghast & Wheeler; S. Everett Wilkins, Jr., Esq., appearing.

Fairbanks, Morse & Co., George C. Worthley, Tillinghast, Collins & Tanner; Westbte H. Chesebrough, Esq., appearing.

HEARING ON MOTION TO STAY ORDERS

ARGUMENT ON ENTRY OF ORDER IN C. I. 6070.

435

Tuesday, April 20, 1948
10:15 A. M.*Arguments of Counsel*

The COURT. You may proceed.

Mr. KELLEHER. May it please your Honor—

The COURT. Mr. Kelleher?

Mr. KELLEHER. The Government, in support of the pending motion this morning, has prepared a very brief memorandum of authorities which I am submitting to the Court and copy of which has been served upon counsel for the defendants.

The motion addressed to your Honor this morning is for a stay of certain orders entered in the case entitled United States v. Wallace & Tiernan Co., Inc., *et al.*, Indictment No. 6055, those orders being dated February 18, 1948; March 4, 1948, and April 5, 1948. The orders in question require the Government to return or, rather, to surrender to the defendants certain photostatic copies of documents which were reproduced from documents produced before the Grand Jury for the October, 1946, term of this court.

In February of this year your Honor held that because the originals had been required to be produced in violation of the Fourth Amendment to the Constitution, the Government had no right to retain photostatic copies of the documents. At the time of the entry of the order of February 18th, which was the order requiring the Government to return the photostatic copies of documents produced by the Wallace & Tiernan group of defendants, on application of the Government, the Court entered an order
436 requiring production on April 20, 1948. The other orders to which the present motion is addressed are similar to that entered in favor of the Wallace & Tiernan group. The order of April 5 and the order of March 5 require the Government to surrender all of the other documents—photostatic copies of all of the other documents produced by the other defendants in the case.

We have advised the Court that it is the intention of the Government to raise, if possible, on appeal the validity of your Honor's ruling embodied in your opinion handed down early in February of this year. It is the intention of the Government, because of the appellate rules, to resort to the civil case now on file in the court and numbered 705 as a vehicle to test the validity of that order and that ruling.

Pursuant to that intention the Government last Friday filed two motions in the civil case: one entitled "Motion for Production of Documents under Rule 34" and the other entitled "Motion to Vacate Order on Motion for Return of Photostatic Copies of Documents." By those motions the Government seeks a determination of the right of the Government to retain the photostatic copies of documents now in its possession and, in addition, to obtain by the discovery process provided by Rule 34 of the Federal Rules of Civil Procedure the original documents of which the photostatic copies are reproductions.

437 The question presented by those motions is one not heretofore decided by this Court. This Court has declined to indicate, quite properly, whether and to what extent the Government may use any of the documents involved in the prior orders of the Court in the civil case. We shall urge before your Honor, when those motions are heard, that the Government is entitled to retain the photostats and to obtain the original documents from which the photostats were reproduced for use in preparing for trial and in the trial of United States v. Wallace & Tiernan Co., Inc., Civil Action No. 705.

Since those motions filed in the civil action raise the question of the right of the Government to retain the photostatic copies, since that question is one involving rather close principles of law, we believe that the Government should not be required to surrender at this time the photostatic copies of documents covered by the orders which I have described. It is our contention that the Court, in the proper exercise of its discretion, should take such steps as may be necessary to preserve the *Status quo*. We submit that no prejudice can be occasioned the defendants by permitting the Government to retain the photostatic copies of documents which it itself has made until there has been a final disposition of the issues raised in the civil case concerning the right of the Government to use those copies and its rights to obtain the documents from which the photostats were reproduced.

438 As a consequence, if it please the Court, we have moved the Court to stay the orders of February 18, March 4, and April 5 until further order of the Court, the reasons being, as I have said, that this stay, in the opinion of the Government, is desirable and necessary to maintain the *status quo* until doubtful questions involving the scope and effect of those orders have been finally settled.

(Argument by Mr. Tuttle; Statements by Mr. Lawrence Hogan on behalf of Novadel-Agene and Industrial Appliance Corporation; by Mr. Chesebrough on behalf of Fairbanks-Morse; by Mr. Wilkins on behalf of Builders Iron Foundry and Proportioneers, Inc.)

439 Mr. KELLEHER. May it please the Court, just an observation on the comments of counsel for Fairbanks-Morse and for Proportioneers and B.I.F. I think your Honor will recall that Fairbanks-Morse filed but did not argue its motion for return of the photostatic copies of documents obtained from it after the Wallace & Tiernan motions had been filed. Neither Proportioneers nor Builders Iron filed any such motion until after your Honor had ruled in February of this year on the Wallace & Tiernan motion. The Government was very happy at the time to cooperate with counsel for those companies and to assure them that we would agree to the entry of any order which would conform to the same order that your Honor entered on the motion of Wallace & Tiernan, so that any consent there with respect to the entry of those orders was simply one of accommodation to counsel to avoid the necessity for their rearguing the matter.

The COURT. What difference does that make?

Mr. KELLEHER. I don't know that it makes any difference except that the point is made here it was entered without objection of the Government.

The COURT. Why should your order now affecting them be granted? That is their contention and it is in regard to that I would like to hear from the Government. You can't blow hot and cold, can you?

Mr. KELLEHER. How does your Honor understand that I am blowing hot and cold?

440 The COURT. Do you want your stay as to them now under this motion when you consented to granting the order?

Mr. KELLEHER. I am just making the point there was no consent to the entry of the order. The orders were arrangements which were made out of convenience to counsel, avoiding the necessity of argument in which it was understood that the same rulings that were entered by the Court against Wallace & Tiernan would be entered against those or in favor of those defendants. In other words, if the Wallace & Tiernan motion were granted, the Government was willing that a same type of order be entered as far as B.I.F.,

Proportioneers, and Fairbanks-Morse were concerned. If the Wallace & Tiernan motion were denied, it was agreeable to the Government or to counsel for those parties that an order permitting the Government to retain the photostats be entered as against them. That was the sum and substance of the arrangement, but to the extent that we opposed the Wallace & Tiernan motion and opposed the entry of that order, we also opposed any entry of a similar order against us and in favor of Fairbanks-Morse and Proportioneers.

The COURT. What have you to say, Mr. Kelleher, in regard to the contentions made by Mr. Chesebrough and Mr. Wilkins that their clients are not parties to the civil action and, therefore, it is not appealable in regard to them?

441 MR. KELLEHER. My answer to that is everything is wrapped up in a single package here. The question involved here is whether the Government is forever precluded in using in either of these actions pending in the court any documents obtained from the Grand Jury as a result of subpoenas served upon any companies from which documents were obtained. That issue will effectively, we believe, be raised in the pending motions now before the Court in the civil case.

By those motions we intend to present, first, to your Honor and, thereafter, to the appellate courts which have jurisdiction over the case the question of whether there has been an unreasonable search and seizure in violation of the Fourth Amendment by the use of the subpoenas. Now, at any stage, at a later stage in the civil action, we can issue subpoenas to companies which are not parties defendant in the civil case. The right of the Government to obtain documents, pursuant to subpoenas *duces tecum*, will to a large extent, turn upon the rulings which your Honor will make upon the motions now pending in the civil case.

In other words, if your Honor holds in the civil case that the Government is not entitled to use those documents in the civil case, then your Honor consistently will hold, I assume, that we cannot subpoena them. Therefore, those documents will be put beyond the reach of the Government when we attempt to obtain them by subpoenas
442 *duces tecum*.

The reason for permitting us to retain the photostatic copies of the documents of companies, which are not defendants in the case, is the same.

We contend, your Honor, that we have not violated the Fourth Amendment in obtaining those documents. We con-

tend we should be permitted to use the photostats in the preparation for trial of the case. We believe that is an issue which should be settled in the case and settled by an appellate court, and that is the reason we are adopting the procedure which we have followed. If we are entitled to use the photostats of non-defendants as well as defendants, then the reason is the same for permitting us to retain the photostats regardless of whether they cover documents in the possession of defendants or companies which are not defendants in the case. In either instance the question before your Honor and before an appellate court will be whether the documents which are evidence in this case, are documents which we may use in the case. If they are such documents, then any copies that we have may be used permissibly for the preparation for trial. So I think both types of defendant stand on the same basis.

The question raised by Mr. Tuttle seems to me to be this: Can the defendants now insist upon the return of the photostats simply to prevent the Government from taking an appeal from your Honor's ruling?

I would like to cut aside for a minute and cut
443 through the web of legal technicalities which Mr. Tuttle has so cleverly spun this morning and to tell your Honor frankly what the Government's position is here.

The question which the Government desires to raise, if it please the Court, is not necessarily the validity of any particular order. It is the fundamental ruling of the Court which the Government attacks, the ruling that there has been an unconstitutional search and seizure which forever taints the documentary evidence in this case. We wish to know whether your Honor is correct in your holding that the Government may not use the documentary evidence obtained through the Special Grand Jury for the 1946 term. That is the issue. That is the issue which we intend to raise in the civil case and are raising now by the motions filed last Friday. If your Honor denies our application for discovery and our motion to be permitted to retain the photostatic copies of the documents for the trial of the civil case, we have proceeded one step along the road which, in our view, will permit us to gain eventual appellate review.

The COURT. Let me ask you on that, suppose the Court denies those motions. What is the next step in this proceeding?

Mr. KELLEHER. The next step, your Honor.—

The COURT. I have been trying to find out.

Mr. KELLEHER. I will outline the procedure on that.

444 The COURT. As long as you are so frank upon it.

Mr. Kelleher.

Mr. KELLEHER. We propose by the denial of the motions before your Honor; if your Honor denies them, to issue a subpoena *duces tecum* calling for the documents; and, as I have already said, your Honor, consistently with your previous rulings, would deny that. That depends upon answering, of course. That depends upon when the defendants are compelled to answer the complaint.

The COURT. Yes.

Mr. KELLEHER. We must have a trial date.

The COURT. Let's put it for some date certain.

Mr. KELLEHER. Just a day certain so that we can issue our subpoenas. At that time if the subpoenas *duces tecum* have been denied, if the motions for discovery have been denied, if your Honor refuses to permit us to use the photostats for preparation for trial, we are prepared to announce to the COURT that the Government is unable to proceed further in the trial of the case; that the Government has no evidence of any substantial amount on the basis of which it can go ahead with the trial; and we will, therefore, suggest to your Honor that you enter judgment with prejudice against the Government and from that judgment we shall appeal directly to the Supreme Court of the United States. That is our present plan and, I believe, quite a correct one because we are prepared to sustain the procedure with authorities of federal courts.

445 Now, that, in essence, is what we intend to do, if

it please the Court. There is nothing lawless about that, your Honor. We are accused in one breath of not attempting an appeal from your Honor's first order when the considered opinion of the Department of Justice was that there could be no appeal. The law was against us. We abided by that law. We also accepted your Honor's ruling on the validity of the Grand Jury as correct. We abided by that. In the performance of our public duty we found that it was necessary for us to conclude that the District Court here was not in error and that, therefore, the Government should not appeal from that rule.

The only opportunity that we have ever had to take an appeal from your Honor's rulings is the instant procedure which we are now pursuing. When your Honor's order of February 18 was entered, the Government, as we ex-

plained, was of the opinion that unfortunately we had no right of appeal because of the pending information. In other words, we reluctantly were forced to conclude that we could not appeal from the order of February, 18 because it was an interlocutory order. That does not mean we had not considered the matter; had not attempted by the most painstaking exploration of the authorities to find a method of appeal. We had. We were, therefore, compelled at each stage of the procedure which we have followed to accept your Honor's ruling at that time; first, in January or February a year ago when your Honor first ordered us to
 446 return the documents which had been impounded because that was not an appealable order under the Criminal Appeals Act, and Mr. Tuttle does not assert it is. He admits that he has given it no study.

Mr. TUTTLE. No what?

Mr. KELLEHER. No study. We did, your Honor. We gave great study to the right to appeal in February and we found we could not.

The procedure we suggest now is the result of a great amount of study and a procedure which, we believe, offers the only avenue for appeal by the Government and a respectable one because by this method we will test the precise issue which your Honor passed upon. That is whether these documents are tainted by reason of the subpoenas issued on behalf of the illegal Grand Jury.

Now, what is the defendants' position here? Where is their prejudice? Your Honor, they have the original documents. They have photostatic copies of those documents which would be every photostat in our possession obtained through the 1946 Grand Jury. How are they prejudiced? They are prejudiced, as Mr. Tuttle almost frankly admits, because by retaining the photostats we are permitted to appeal from your Honor's rulings in these matters. That is the only conceivable way in which the defendants can assert any prejudice, and I assert, your Honor, that that is not prejudice.

The Government is entitled to test this matter.
 447 if it is at all possible to test the matter, and to prepare our record, it is essential that we have the benefit of those photostatic copies of documents. I mentioned in chambers before your Honor—and I am surprised that Mr. Tuttle quarrels with that now—that we intended to use those photostatic copies of documents to perfect our record so that we could appeal. I assert that that is what we in-

tend to do again. I made it perfectly clear—and your Honor understood at that time—that there was only one reason for giving us a stay until April 20, and that was to permit us to pursue the procedure which we have followed to date but we are not through. The procedure for taking the appeal has not been completed. There are numerous or various other steps, including the subpoena *duces tecum*, which must be undertaken before we reach a final stage where we can go up.

It would be, I submit, a serious handicap to the Government to turn over the—to require us to surrender the photostats to the defendants at this time. It may be necessary for us from time to time to consult those photostats in order to prepare this record for an appeal; not to prepare it for the trial of the case but to try to present this matter to an appellate court. The defendants have never once offered to compromise on this matter. They do not wish or they have, rather, objected to impounding the documents with the Clerk. They want to obtain those documents to sequester them so that we cannot appeal.

448. I say, your Honor, that under those circumstances where there is no showing whatever of any prejudice to the defendants, where the Government may be substantially prejudiced if the *status quo* is upset, I say, in those circumstances; this Court should stay those orders—stay those orders until we are certain what the law is in this case.

MR. TUTTLE. May I say a brief word of rejoinder, your Honor?

THE COURT. Yes.

MR. TUTTLE. In colloquial language, the Antitrust Division has at last taken its hair down and we see really what they have in mind, definitely stated. They expect your Honor to deny the two notions in the civil case which they will bring on on May 3. They expect, meanwhile, to get an answer out of us in the civil action and then they will issue a subpoena either by application to your Honor or directly; and whether we move to vacate or whether they apply for leave to issue subpoena, they expect that to be denied. Then they will have the civil case on the calendar and they will go before your Honor in the civil case and say, "Well, in view of all these denials we frankly admit that we have no information sufficient to sustain a bill of complaint," which is identical with the old indictment and identical with the pending information except what they obtained through these illegally seized documents.

449 Parenthetically I observe that that is a poor response to your Honor's considerate decision that they might be able to sustain their allegations by information obtained elsewhere than through the illegally seized documents. They now admit that that hand of cooperation which you extended to them, they are unable to grasp, and that they have no case, and that they are prepared to say, when this case comes on for trial, that they have no case which they can make out except by and through the illegally seized documents. And then they say they will apply and ask the Court to enter on their consent or at their request, as they wish to put it, a dismissal on the merits, to wit, with prejudice. And then having secured a decision at their own request, they propose to appeal from it.

This thing gets more Alice-in-Wonderland every time we hear about it. And then they say, to make it even more extraordinary and out-of-this-world, that in order to go through all that procedure, they have to have the photostats because, forsooth, they are going to issue a subpoena as the capstan in that plan of procedure not at all for the photostats but for the original documents, a subpoena which they expect your Honor to deny. If that is their plan, the return of these photostats isn't going to affect it in the slightest degree because its culmination is a subpoena for the originals, and that is exactly what they are asking even in advance of a subpoena in their second motion for May 3,

450 Rule 34. They ask that "the Court order produced and submitted for their inspection a copy of the following original documents;" in other words, the originals of the photostats which went back over a year ago.

How on earth do they make out a case under those circumstances and with the frank statement that they make now as to what the course they are going to pursue is? How on earth do they say they have got to have the photostats if they are going to issue a subpoena for the originals or on May 3 they are going to ask your Honor to make an order for the return of the originals. They can do that even if the photostats are in New Jersey. But then they say your Honor having denied all this procedure, as they expect, they are going to use those documents and everything in them to spread it on a public record where anybody can see it—our private papers—spread it on a public record in the form of a record on appeal. They say they need these five thousand documents in order to incorporate them

in a record on appeal and to use them argumentatively before an appellate court before that appellate court has decided anything about the case, much less decided that your Honor was wrong.

That is the most extraordinary thing I have ever heard, first, because they don't need the photostats for appealing in accordance with this strange procedure they are outlining here. They don't need the photostats for that purpose and to say that we want to get the photostats back to prevent their playing this sort of game with our constitutional rights is absurd and wrong. It never occurred to me and it doesn't occur to me now that I hear it for the first time.

I was before your Honor at the last occasion when this matter was discussed and Mr. Kelleher, I say, frankly and without any fear of contradiction, never outlined this procedure at all that he is outlining now. In fact, your Honor pressed him for a clear definition of what he was going to do and his response always was that the Department hadn't made up its mind; it was studying the situation.

MR. KELLEHER. I mentioned discovery. I mentioned subpoenas. And his Honor will confirm me on that, and I told his Honor we would prepare those documents for those motions from those photostats.

MR. TUTTLE. If that is your recollection, I am not going to get in a personal altercation with you over it. I know my ears were very much open to endeavor to ascertain whether the Department had decided on a definite course and I left that room with the conviction that you were stating that you had not—your Department had not decided, Washington hadn't decided on a definite course but, meanwhile, in any event, you would want to list the documents because if you had to return them, you would want a receipt and the Court thought you would be entitled to a receipt.

Now, then, so that we get this extraordinary situation here that they are saying that if we get the photostats back, they can't work this procedure. If we get the photostats back, they can't work this procedure. At what point can't they work the procedure if it is workable at all? They don't need it for the subpoenas. They don't need it for a record on appeal and if, when the time came, they couldn't make up a record on appeal in the opinion of the Circuit Court of Appeals, we have the photostats and if they can get an order to get them by due process, they will be available as I have said before.

So that what it comes down to is we have at last had a frank confession from them that they don't agree with your Honor's original decision returning the originals. That is where the shoe pinches, they say now. They do agree that your Honor was right in holding that there was no lawful Grand Jury. In other words, in the eye of the law there was no lawful Grand Jury. They do agree the subpoenas *duces tecum* they issued were really nothing but pieces of paper and constituted illegal procedure under the Fourth Amendment. They say they agree to that. The Department has studied them. That is the reason they didn't appeal from your Honor's decision setting aside the indictment. They deliberately came to the conclusion that your Honor was right, so they now say. At times in the past they have intimated—and we have it in the stenographic content of other records—that somehow or other your Honor's decision forced them perhaps into a very difficult situation, and your Honor said you didn't
 433 see how that could be the fault of the Court.

Now they say your Honor was right. If your Honor was right in so holding, on what theory was your Honor not right in, at the same time, wiping the slate of all that illegal procedure? If it was unconstitutional, it was unconstitutional as a whole, not merely ninety per cent. Your Honor was right in returning the originals obtained unlawfully through the compulsion of these subpoenas which they themselves admit were nothing but pieces of paper. But, nevertheless, they say that as to ten per cent of that decision they think your Honor was wrong; and although they never attempted to appeal from it, they now intend to go around Robin Hood's barn and ask for a licking in the civil case in order that they can appeal from what they ask for.

I don't think the Constitution and constitutional rights can be juggled that way. I don't think they can play that sort of legalistic legerdemain with our constitutional rights. They say how are we prejudiced. I have made that plain and they made it plain. In the first place, prejudice is immaterial because the papers are ours; and, in the second place, they have told us how they intend to make any use of these papers they see fit in order to prove a case against us and in order to take any kind of an appeal any time they wish. They can't say I am standing on technicalities when I am only doing what your Honor said with great solemnity, that we can't fritter away constitutional rights.

They are the supreme law of the land. And if this
 454 is to be, as your Honor said, a government by law
 and not a government where the police officers are
 the law, we mustn't fall into the idea and into the phrase-
 ology of applying the terminology of technicalities to an
 invocation of constitutional rights. Once that is accepted
 we only know from the events of the day where gradually
 it would go, and I would have assumed, with all respect
 for the Department of Justice, that having once made up
 their mind that your Honor was right in the basic decision,
 they would have taken the consequences and not only taken
 the consequences but been here to defend them because
 there is an oath taken by the Department of Justice as well
 as by all other public officials to sustain constitutional
 rights, to sustain the Constitution, and sustain decisions of
 the courts which are rightly made under the Constitution.

The COURT. Anything else, gentlemen? Take a short re-
 cess. Mr. Edwards has handed the Court an "Affidavit in
 Opposition to Motion to Stay Orders" and I desire to
 read it. Take a short recess.

(Recess)

(Decision by the Court)—see pp. 21a-21g (that follow)

455 District Court of the United States
 for the District of Rhode Island

UNITED STATES OF AMERICA

v.

Ind. No. 6055

WALLACE & TIERNAN CO., INC. *et al.*

Before His Honor, Judge Hartigan

Tuesday, April 20, 1948

Hearing on Motion to Stay Orders.

(This only contains the part of the hearing from the time
 that the Judge began rendering his decision until the noon
 recess. The arguments of the morning and the long col-
 loquy of the afternoon are not yet written out.)

456 Tuesday, April 20, 1948.

The COURT. This matter was heard on the motion to
 stay orders entered on February 18, 1948, March 4, 1948,
 and April 5, 1948 until further order of the Court, said
 motion having been filed by the United States. The mo-
 tion is addressed to Indictment 6055, an indictment which
 has been dismissed by the Court, from which no appeal
 was taken or from which no appeal was taken to any order
 ancillary to the dismissal of the indictment.

The argument of the Government, in its address to the Court is, in substance asking the Court to help the Government to perfect a proposed procedure that it intends to adopt in another action, namely, Civil Action 705, a matter which is of a civil nature as against a matter in which the Court has already rendered opinion in Indictment 6055.

The argument, it seems to the Court, is in effect asking the Court to do something that the Court has already indicated is in violation of the constitutional rights of the defendants here, and I refer to the opinions which are on file in the case.

This Court, standing between the parties, does not see why it should be an aid to the Government any more than it should be an aid to the defendants under the circumstances. This Court does not believe that that is the duty of the Court, to aid one party as against the other in any matter pending before the Court. It is the duty of the
457 Court to decide the issue involved. That is the feeling of this Court under the circumstances here.

The Court has already ruled, as I have stated, that in its opinion the constitutional rights of the defendants have been violated and it has issued orders for the return of not only the original documents involved in these cases, but also the photostats of the said original documents.

The Court feels that under the circumstances there is nothing left to do but to deny the Government's motion in Indictment No. 6055 to stay the orders issued February 18, 1948, March 4, 1948, and April 5, 1948. The motion is accordingly denied.

Said motions, however, require the Government to return the documents as of today, as I recall it, Mr. Kelleher?

MR. KELLEHER. That is correct, your Honor.

THE COURT. In view of the situation which has arisen here in the record as it now appears, of course, the Court feels that it might be physically impossible to comply with the order today; and from previous discussions in arranging for this hearing, the Court is well aware of the fact that the Government has no intention to violate the return as of today. What is a reasonable time for the production of these documents now in view of the Court's decision?

MR. WILLIAM EDWARDS. May it please the Court, we shall be glad to pick them up at Mr. Kelleher's office in Boston
at any hour today or tomorrow.

458 THE COURT. Well, I know, gentlemen—It is noon time now. By the time counsel get to Boston—I think a few days would be a reasonable time.

Mr. KELLEHER. I think, your Honor, we can have them back in seven days.

The COURT. Seven days?

Mr. KELLEHER. Yes.

Mr. WILLIAM EDWARDS. Why, may it please the Court, could I just present one consideration on that? According to our information, from what Mr. Karsted told us at one of the conferences, these documents are in one drawer filed. In bulk they don't amount to a percentage of the original documents which, on that afternoon in March, were returned in the course of one hour. ~~As I understand it—~~ and Mr. Karsted and Mr. Kelleher will correct me if I am wrong—they could all be put in the back seat of an automobile. They are all together at the present time, and if we offer to pick them up from their Boston office at any time, I honestly can't see what purpose is to be subserved by delaying the matter seven days unless they still want to use them for improper—

Mr. KELLEHER. We don't want to use them at all, your Honor, and I will assure your Honor we won't use them for any purpose whatever.

The COURT. On representation of Government counsel, which the Court has no reason to doubt, and according to the developments in the case, one week is not an unreasonable length of time. The order will be modified to such extent as it pertains to the date.

Mr. WILLIAM EDWARDS. I think instead of having the week, if they would return them here to Providence then within that week at our office or the Clerk's office.

The COURT. To counsel of record on or before April 27th.

Mr. KELLEHER. I assume, of course, we will be permitted to make any necessary record for receipt purposes?

The COURT. I can't advise the Government what it may or may not do.

Mr. KELLEHER. I am afraid, your Honor, that you have to because you ordered us to return them.

The COURT. The only effect of this order is to modify the order as to date.

Mr. KELLEHER. I understand there is no objection to our obtaining a receipt for the documents from defense counsel.

The COURT. I hope you gentlemen will get together.

Mr. KELLEHER. Your Honor, we can't get together on this because they have taken the position we are not en-

plied to it. I assert we are entitled to a receipt from the defendants for the document. We are entitled to know, if we get the documents back eventually.

The COURT. Is there any objection to a receipt?

Mr. WILLIAM EDWARDS. No.

The COURT. Very well.

460 Mr. WILLIAM EDWARDS. But I have got a proviso on that, your Honor. Mr. Kelleher started to say, "We don't want to make any use of these documents except". Your Honor cut him off. I don't know what his exception is.

Mr. KELLEHER. That is it, a receipt.

Mr. WILLIAM EDWARDS. He must have a list of these documents already. We will sign any paper that constitutes a receipt, but I still think on the record connected with these motions coming up on May 3rd, they are going to use these records—or somebody is, perhaps not he—. For that purpose I necessarily make my assent a very qualified one.

The COURT. The order may be modified, as indicated by the Court, that the date be changed to April 27th; and that they may be returned to counsel of record for the defendants; and under the agreement the Government is entitled to a receipt for the return of the documents.

Mr. WILLIAM EDWARDS. May it please the Court, does your Honor want to have a formal order entered on that or could a notation be made at the bottom of Mr. Keller's motion?

The COURT. Gentlemen, in view of the—it would seem to the Court you ought to enter formal orders modifying the date so your record will be complete. That would be a better procedure. I think you have done it in all the cases and I think it would be well to do it in this.

Mr. WILLIAM EDWARDS. We will prepare that order. Could we make a time now to see your Honor?

461 The COURT. Yes, I will be here all day, gentlemen, except for the lunch hour.

Mr. WILLIAM EDWARDS. I understand except for making a receipt the Government is not to do anything else with the documents and is not to make any copies of them.

The COURT. The Court is not making any ruling on matters not before it. I have made a ruling on the matter before me.

Mr. WILLIAM EDWARDS. Your condition of the extension was they should have a right to a receipt. The only point I am making is it is limited to that.

The COURT. I have ruled, gentlemen. Did you gentlemen desire to present orders at any specific time this afternoon?

Mr. EDWARDS. Two o'clock; two-fifteen.

The COURT. Two-fifteen.

Mr. EDWARDS. Two-fifteen would be fine for me.

Mr. KELLEHER. I have one other matter to clarify. Your Honor denied the motion for particulars and the motion addressed to the jurisdiction of the court on the civil case on the 16th. As I understand it, the practice of this Court is that opinion will constitute or does constitute an order denying those motions, and any time for answer runs from that date.

The COURT. I usually enter an order. I think that is a better practice, gentlemen. It is always confusing as to when time starts. The time starts from the time the
462 Court files an opinion and the Clerk enters it or the order is entered. I think the better practice, in order to fix time, is to file an order.

Mr. KELLEHER. May we settle that order this afternoon?

The COURT. Unless you gentlemen agree that is the—

Mr. KELLEHER. I think it should be. It was my understanding that was the practice here in the District. I may have been misadvised.

Mr. EDWARDS. From my own part, I would advise my clients our usual practice was, as your Honor has said, to enter an order. I suppose the usual practice here is for the winning side to prepare such an order, just as I assume we are going to prepare an order on the motion to stay. Any time Mr. Kelleher wants to take up with the Court the order on these two decisions of last Saturday, that would be agreeable to me. I will be around any time; also an order to be settled or entered on the decision of last Wednesday in the criminal case.

Mr. KELLEHER. In the civil case I propose we settle orders on that case this afternoon if we may, your Honor.

The COURT. Very well.

Mr. EDWARDS. Satisfactory to me.

I hereby certify that the foregoing, Pages 1 to 7 inclusive, is a true and accurate transcript according to my stenographic notes.

EUNICE J. ARCHAMBAULT
Court Reporter

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Afternoon Session

2:15 P. M.

ARGUMENTS OF COUNSEL

The COURT. You may proceed, gentlemen.

Mr. EDWARDS. May it please the Court, on the motion which was heard this morning I have a draft decree here which has been submitted to Mr. Kelleher and Mr. 464 Karsted which, I believe, is satisfactory to them, and it is also satisfactory to Mr. Wilkins representing Builders Iron Foundry and Proportioneers and to Mr. Chesebrough representing Fairhanks Morse Company and Mr. Worthley; and it is also satisfactory to Mr. Hogan representing Novadel-Agene.

Mr. KELLEHER. We have no objection as to form, your Honor.

The COURT. Very well.

Mr. EDWARDS. The second matter I might take up is the opinion which your Honor handed down last Wednesday in the Criminal Action No. 6070 on the motion to dismiss the information and to preclude. I have an order here which is satisfactory in form to the Government attorneys. I would like to point out to the Court— Mr. Kelleher has requested I should do so and I should do so. The last two sentences of your Honor's opinion read: "The Court's opinion of February 6, 1948, is controlling as to paragraph 3 of the motion". That was the preclusion paragraph. Then the next paragraph: "The motion to dismiss the information and to preclude is denied." We rather thought, subject to your Honor's approval, that the word "preclude" in that second paragraph might more accurately reflect the motion itself if it were changed to "expunge" because paragraph 3 was the preclusion paragraph and paragraph 2 was the expunging paragraph.

I don't know if I make myself clear on that. So 465 that we have framed our order following the language of the Court:

"FIRST. That the opinion of the Court dated the 6th day of February 1948 in Indictment No. 6055 is hereby declared to be controlling as to paragraph '3' of said 'Motion to Dismiss the Information and to Preclude,' and paragraph '3' reading as follows: '3. An order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or con-

tained in any of the aforesaid illegally seized papers and documents'.

"SECOND. That otherwise the motion to Dismiss the Information and to Expunge be and it hereby is denied."

The COURT. Any objection to the form?

Mr. KELLEHER. No objection as to form on that. I assume that is correct, your Honor, that you intended to grant so much of the motion as related to the preclusion and to deny the other parts of the motion consisting of the paragraph requesting the Court to dismiss and the paragraph requesting the Court to expunge certain parts of the information.

The COURT. Well, the order as submitted seems 466 to me to follow the opinion.

Mr. KELLEHER. I don't believe it does, your Honor. That is what I wanted to get straightened out. Your will note in the last two paragraphs of your Honor's opinion you grant the motion to preclude. You deny the motion to dismiss and to preclude. In other words, there is an inconsistency there. It is my understanding from the whole tenor of the opinion what you intended to do by the last paragraph was to deny the motion to dismiss and to expunge and to grant the motion to preclude.

Mr. EDWARDS. I think the order says that. I think the Court, if I might say so, was simply using the phrase "to dismiss the information and preclude" in that last paragraph as the title of the motion. On Mr. Kelleher's suggestion we have simply narrowed the heading down so that it would be absolutely clear.

The COURT. I think I did follow the title of the motion.

Mr. KELLEHER. I understand then so much of the motion as to preclusion is granted.

The COURT. In regard to the motion to expunge the Court didn't feel at this time that it could say that you couldn't sustain the allegation probably by some other evidence. I don't know. The Court didn't feel it ought to take it upon itself at that time to make such a ruling and it is the same in regard to the motion to preclude.

Mr. TUTTLE. You will see, your Honor, on page 2 467 of your opinion there were three paragraphs; one, a motion to dismiss; in the alternative, a motion to expunge; and, third, the paragraph which your Honor says your prior opinion controlled. So it seemed plain to us all and it is so embodied in the order. In the last sentence you were really directing yourself to paragraphs 1 and 2 of the motion.

Mr. KELLEHER. May I be heard not as to the form of the order but as to the question whether or not the order should be entered at this time?

The COURT. Yes.

Mr. KELLEHER. I request your Honor to delay any entry of the order for the following reason:—

The COURT. I didn't get the first part of what you said.

Mr. KELLEHER. I request your Honor to delay entering an order in the case based upon the information,—

The COURT. 6070.

Mr. KELLEHER. Thank you. —for the following reason: That order is based upon the assumption which has, in turn, the ruling of the District Court that there has been an unreasonable search and seizure. As your Honor is only too well aware, the Government intends to test that. I don't think, since we cannot test it in the criminal case, that the Court should take any step in the criminal case which might prevent correction of an error if the appellate court holds that there has not been an unlawful search and
468 seizure. I, therefore, think that pending determination on appeal of this issue any entry of a formal order in 6055 should be delayed.

Mr. EDWARDS. This is 6070.

The COURT. You agreed. Do you want to correct the number on that, Mr.—

Mr. KELLEHER. 6070.

The COURT. Instead of 6055 that is what you are addressing yourself to now?

Mr. KELLEHER. In other words, my point is by entering a final order at this time in 6070 you may place the Government in the position where if your Honor has erred, it may be difficult for us to gain a correction of that order in the criminal case by your Honor after we have appealed in the civil case. In other words, I don't think the order should be entered in the criminal case until this issue has been passed upon by an appellate court. The defendants will not be prejudiced by it. It will simply leave the record open so that it can be corrected without dispute about the order having finally been entered some time before application is made for correction following the appeal which, as I have asserted, the Government intends to take.

Mr. EDWARDS. May it please the Court, what I have to say in answer to Mr. Kelleher could be stated under
469 two points. First, as we noted this morning, the entry of orders after opinions under our local prac-

tice is more or less a ministerial act on the part of the Court, simply codifying and confirming what has been decided; and I don't see, therefore, that this oral request for a stay has much pertinency in view of the nature of the act that the Court performs in entering an order on an opinion which has already been filed.

The second point is that no question was raised at the time that this matter was argued and briefed in September that it should be deferred for decision. No question has hitherto been raised that in some way the handing down of an opinion or the entry of an order should be stayed, and this is the first time that any of us have heard of this rather strange request.

Mr. Kelleher has got it on the record that it is entered over his protest, just as I suppose he doesn't agree with the part of your Honor's opinion that says that the motion to preclude is in effect granted. Of course, I don't expect him to agree with paragraph First of this order; but that the Court having spoken, it should be barred from carrying out that opinion by the ministerial act of entering an order because the Government may do something in some other case seems to me to bring us right back to the argument we had this morning.

This is another motion for a stay dependent not on what is going to happen in this case but on what may happen in another case, and I earnestly urge the Court
470 for the reasons advanced this morning, this is an *a fortiori* case. If the motion to stay wasn't good as to what was said this morning as to the other case, it certainly isn't good in 6070, which is another case. This morning we had to do with 6055. The plans which Mr. Kelleher has concern Civil 6055. This is Criminal 6070.

Mr. TUTTLE. This, of course, your Honor, would nullify not only what was said on both sides this morning but also nullify your Honor's decision because it would mean that they would have not merely a stay running far beyond seven days but an indefinite stay, and we wouldn't, at the end of seven days from today, be getting our papers back.

Mr. KELLEHER. I am sorry. I haven't made myself clear apparently.

The COURT. I was just going to say, Mr. Kelleher, the position of the Government isn't quite clear at the moment.

Mr. KELLEHER. I am sorry. I will try to state it a little more clearly because apparently I have misled not only counsel but the Court. Our position is this: The order now

proposed to be entered in Criminal Action 6070 would preclude the Government from using in any way any of the documentary evidence which was obtained through the Grand Jury. That rests upon the validity—

The COURT. Precluding them from using them only in this action.

471 Mr. KELLEHER. That is correct. In this action, in the 6070, That is correct. That depends upon the validity of your Honor's previous conclusion that there has been an unreasonable search and seizure. If such an order is entered in the criminal case, the Government cannot appeal from the order. On the other hand, if the Government is eventually successful in appealing in the civil action and an appellate court holds that there has not been an unreasonable search and seizure, then, of course, we are entitled to use the documents not only in the civil case but in the criminal case. Now, I assume that your Honor, if there were such a ruling in the civil case, would wish, to the extent that you could, to correct any error that had been made in the criminal case.

The COURT. Wouldn't that automatically vacate this order if what you say is so?

Mr. KELLEHER. I am not certain, your Honor. This morning counsel raised the question of whether the entry of an order from which no appeal was taken, even though it was the view of the Government that an appeal could not be taken, was not an estoppel against the Government for everything as far as that order was concerned.

I now merely ask the Court to refrain from entering such an order which, at later date, even though the order was completely erroneous, the defendants might claim could not be rescinded by this Court. In other words, leave this where it is now. Your Honor has expressed

472 your views as to the law that is to control. Let those views stand. We return the photostats, of course, pursuant to the other orders of the Court but we leave the door open so that if, at some later date, an appellate court sustains us in the civil case, our hands are not thereafter tied so that even though this order is erroneously entered, it cannot be vacated.

The COURT. I don't follow you on that at all. If this is wrong, if you can get a reversal with your proceeding that you outlined this morning, this order wouldn't be worth the paper it is written on, would it?

Mr. KELLEHER. If defense counsel would concede that at this time, I wouldn't raise any objection to its entry.

• Mr. EDWARDS. I am not making any concession because I think your Honor's decision of this morning in effect and in substance answers this question.

Mr. KELLEHER. Why don't you meet his Honor's question? Would you raise any objection if at the conclusion the order were based on an erroneous conclusion by the Court?

Mr. EDWARDS. His Honor has not asked me that question and I would prefer not to be interrupted. The argument of the Government as, in substance, your Honor said this morning: "asking the Court to help in the process of another action. This argument, it seems to the Court, is in effect asking the Court to do something that the

Court has already said is in violation of the parties' constitutional rights. This Court stands between the parties. It doesn't see why it should aid

either party. It is not the duty of the Court to aid either party as against the other. That is the feeling of this Court." Substitute, if you will, your Honor, the number 6070 for 705 and you have exactly the issue that is before us.

Your Honor has decided that a motion to preclude should be granted; that our constitutional rights have been violated; and that the opinion of February applies in this case. Mr. Kelleher, as in the case of this morning, is asking that there be a stay of the normal proceeding so that he may be helped out against certain imaginary evils in connection with some other proceeding.

(To Mr. KELLEHER.) Let me finish, please.

And the result is, I submit, exactly as it was this morning on the basis of your Honor's decision that the Court stands here to decide matters as they come before it, to render its decisions, and in accordance with the practice to enter orders on its decisions. To say that the entry of an order on a perfectly clear opinion of the Court and in a form which Mr. Kelleher doesn't object to shall be held up unless we make certain concessions is, to say the least, preposterous.

Mr. KELLEHER. Your Honor, if I can be assured by counsel that my fears are imaginary only, then I would not object to the entry of this order. I am prepared to
474 take such assurances now if counsel will give them to me. If counsel will not, however, give such assurances, I think it is perfectly clear the position they want to place the Government in, and that is that your Honor will tie your hands so that regardless of how erroneous the decision may be and how erroneous a court can conclude

in a civil case your Honor has been, you can never correct this case.

The COURT: What difference is there in this case and any other case which has come before this Court? If this Court is wrong, it would seem to me that the Government would be in a better position having this order entered. Then you can go ahead as you contend or plan to go ahead in your civil action.

Mr. KELLEHER: Again I don't think I have made myself clear. Here is what is going to happen, just to outline the possibilities. We would appeal in the civil case, and this is suppositions. We win. We then come back to your Honor and we say "Now we have cleared away this question of the documents. The Government would like to try both the civil and the criminal case using the documentary evidence." Under the ruling of the appellate court we are free to go ahead on the civil case but in the criminal case the defense rises and says, "Your Honor has precluded them from ever using that documentary evidence in the criminal case." It may be true his Honor's order was erroneous but the Government is estopped from ever proceeding in the criminal case, estopped by virtue of 475, this order which was entered today.

The COURT: I can't follow you on that kind of reasoning.

Mr. KELLEHER: That is what worries me. Defense counsel plays it close.

The COURT: My position, as I am trying to make it clear, Mr. Kelleher, is this order is entered. If some higher court says I am wrong, the order doesn't amount to anything.

Mr. KELLEHER: That may be correct but I want to be in a position where that objection cannot be taken. If they say they won't take that objection, that is all right, but your Honor can see from the attitude of counsel here now that they intend to urge just that point.

Mr. EDWARDS: I see no reason—

The COURT: Now, gentlemen, don't get excited. This Court isn't going to get excited because of contentions of counsel. I think you all understand that by this time. It isn't for the Court to ask counsel on either side what it is going to do. That is not the affair of this Court.

Mr. KELLEHER: There may be a doubtful issue. I simply suggest it without prejudicing the defendants.

The COURT: You haven't given me anything yet that puts it in a different position than this morning.

Mr. KELLEHER: It is a very different position. Supposing it is the law that order cannot be set aside unless we appeal from that order. Then even though we win 476 in the civil case, you have awarded a victory on the merits in effect to the defendants in the criminal case based upon an erroneous order.

The COURT: I can't follow you. I still say, Mr. Kelleher, this Court has based its decision in this case on the fact that the rights of these defendants have been violated by obtaining the documents in the way the Government did. Everything, it would seem to me, that this Court has done would fall, and you start all over fresh.

Mr. KELLEHER: If I could be—

The COURT: What is the difference between this case and any other case if the District Court is wrong?

Mr. KELLEHER: The difference is we go up from the order which is erroneous. We can't appeal from this order, and Mr. Tuttle and Mr. Edwards will, as sure as I am standing today, make the argument because that order is on the record in this criminal case we are forever barred from using that evidence even though the Supreme Court rules in another proceeding your Honor was in error.

The COURT: I can't follow that reasoning. I would say this, Mr. Kelleher: If a higher court says I am wrong, my opinion isn't worth the paper it is written on or any order based on any such opinion isn't worth the paper it is written on. That seems to be nothing more than common sense.

Mr. KELLEHER: Even though in a criminal case—Is your Honor's view to be even if the District Court 477 rules erroneously in a civil case we are free—

The COURT: I am not making any ruling, but that is the logic, it seems to me. If a District Court is wrong, you have got to abide by the higher court's decision naturally. Supposing the higher court says it wasn't in violation of the Fourth Amendment for the Government to get this information in the way it did get it. I am now speaking of the illegal Grand Jury. Doesn't everything I say in these cases fall by such an opinion? It would seem to me that it would.

Mr. KELLEHER: All I hear from the other side is silence profound.

The COURT: I don't care what the other side says. I am giving you my view, as I see it. I must be bound by the higher court's decision naturally.

Mr. KELLEHER: The point they will make is that you are bound to change the orders involved in the appeal but you

are not bound as to orders entered in a criminal case. Unfortunately, I am sure they will make that argument and I would say to avoid that we simply leave the case where it stands today so that there can be no prejudice to the Government and so an argument like that can't be made.

The COURT: This case is no different, so far as this Court is concerned, than any other criminal case.

Mr. EDWARDS: I ask your Honor's judgment. I don't want to be heard further.

The COURT: So we start out with that. Because
478 it happens to be a violation of the Sherman Act as against a violation of any other federal statute doesn't make any difference to the Court, as far as the principle of law is concerned.

Mr. KELLEHER: Your Honor understands that no appellate court is ever going to be able to pass on this order you are now asked to sign.

The COURT: That isn't for this Court to say.

Mr. KELLEHER: I think it is, your Honor. I would say then that this Court shouldn't put itself in a position where through error the Government can never try this criminal case, and that is the position that we may find ourselves in.

The COURT: I haven't said that now that you can't try the criminal case.

Mr. KELLEHER: No, sir, but as I have tried to point out, defense counsel may argue and may be able to persuade your Honor that this order entered now can never be upset unless we appeal from it, and we can't appeal from it. I suggest the easiest way to protect both parties is to let the cards lay where they are now and not to enter an order which is based upon a doubtful question of law and which may be based upon error.

The COURT: Wouldn't that argument apply in any case where the District Court has got to make a ruling?

Mr. KELLEHER: No, because usually you appeal from a ruling which involves error. We can't do it in
479 this instance. That is the difference. In other words, we have to go up through the civil side and there all orders involved in a civil action will, of course, require reversal. We have the unique situation where we can't appeal on the criminal side but where eventually we may find that the rulings upon which the order was based are erroneous rulings.

The COURT: There is nothing to stop you from proceeding in the criminal case, is there?

Mr. KELLEHER: I am afraid there is.

The COURT: What?

Mr. KELLEHER: I don't have any evidence.

The COURT: If you haven't got any evidence—

Mr. KELLEHER: You have precluded me from proceeding in a criminal case.

The COURT: Not any. The Court has precluded you only on those matters that were before the Court as pertained to the documents.

Mr. KELLEHER: I am stating that is our evidence. That is our evidence. That is why we can't go forward with the criminal case and, in addition, we can't appeal anyway. We are going up the other way. We found a way to test your Honor's ruling.

The COURT: As I say, I can't see where this is any different than the very problem we had this morning.

Mr. KELLEHER: It is different, your Honor, in 480 this sense, that this morning while the Government was, I think, substantially prejudiced by your Honor's ruling, as a matter of convenience, nevertheless it isn't fatal. But this entry of this order, if the argument which I have advanced is sound—and I, of course, will advance that when it comes before your Honor,—when the order is entered, if that argument is sound, your Honor may commit error which can never be corrected in the criminal case. To avoid that I simply suggest that your Honor reserve entering—making this order a matter of record at this time so that if at a later date you wish to correct it, then you are free to do so. That is all I ask.

Mr. EDWARDS: May it please the Court, may I just say one word? This motion was filed last July. This point has never been raised before either at the hearing on the motion, the briefing of the motion, or at any other time. I don't see why this isn't exactly like cases which must arise by the dozens every day in our district courts throughout the country, a decision on an interlocutory point in a given case where the party who loses or partially loses is confronted by the problem of what he is going to do. I have never in my brief and humble experience ever heard that process of the court, the mere entry of an order on a decision, should be withheld because of something that somebody vainly fears or horribly imagines with respect to some other case or with respect to some plans of procedure, or what not.

481 I go back inevitably to your Honor's decision this morning if you are not here to aid one side or the

other, to take sides, or to help one side or the other out, either as against these vain fears and horrible imaginings or as against or in favor of some plan of procedure.

The request now before your Honor has never been made in the last twelve months. It is not before your Honor in writing now. The whole practice of our courts is that matters which are submitted are decided and our local practice is that orders are entered thereon. It seems to me our friend hasn't a leg to stand on in this extraordinary, unusual, and unprecedented request.

MR. KELLEHER: Your Honor, we are simply opposing this now and raising this matter now because for the first time we have realized what your Honor intends to do in the criminal case based upon the information. We didn't understand—of course, couldn't predict which way your Honor would rule on those pending motions. I would assert there is a duty on the part of the Court, if I may, a duty to protect either party from what may be irrevocable injury arising from an erroneous ruling; and that is what I assert may occur here, assuming the law is as what might be asserted by defense counsel. Then although we win on appeal, although the Supreme Court of the United States holds there has not been an unconstitutional search and seizure, we are precluded by this order from proceeding in the criminal case. We gain an empty periodic victory simply because defense counsel insist we enter this order at this time.

I say the easiest and simplest thing to do is await the outcome of this litigation before any orders are entered which may have the effect which I suggest.

THE COURT: An order has been entered on the other cases.

MR. KELLEHER: Yes, sir.

THE COURT: What is the difference in this case?

MR. KELLEHER: The criminal indictment has been dismissed. We are not proceeding on that.

THE COURT: An order was entered on that.

MR. KELLEHER: That has been dismissed.

THE COURT: You have the right to appeal from the dismissal of the Court.

MR. KELLEHER: I have explained the reason we didn't appeal. I don't see why I have to have that point made every time I mention it.

THE COURT: You are going to have it made. The Court is going to make points to you.

Mr. KELLEHER: I have explained that, that the Government felt your Honor was right. If we conclude that way, I don't think that should prejudice me. That is why the entry of any order in that case, the indictment, cannot hurt us. The entry of the order here on the information can hurt us. That is why I request now that order be not entered.

483 The COURT: I can't see why it hurts you any more than the opinion, Mr. Kelleher.

Mr. KELLEHER: It can because the opinion is not an order, and the fact is the Court has not acted in the case—As was pointed out this morning to me the Court has not acted in the case until the order is entered, as I understand it. This is to prevent—is to ask your Honor to reserve action in this case until we can be certain that by acting now the Court will not irrevocably prejudice the Government in the criminal case. That is all I am asking.

Mr. TUTTLE: May I point this out, your Honor? This morning we left at the noon recess with the understanding all around that, according to the local practice, orders should be entered on opinions and we would go and prepare orders. The orders as to form have been prepared and agreed to as to form. For the first time this matter is arising. Without an order here we have no check upon the Government's use of all this information for any purpose whatever during the next few months that are ahead.

The return or the non-return of the photostats for which they have been asking stays for the last three or four months is a trivial thing in comparison to what they are asking now because they know what is in all these papers and they are asking leave to use that information for any purpose at all during the next remaining months until they can carry through this procedure which they spoke
484 of this morning, which is so unusual and novel.

Now we all agreed this morning that the ordinary practice was to enter orders. Mr. Kelleher himself said that this morning and we thought that this thing was a matter of presenting the orders here. Now they come and ask for a stay, which is bigger, more comprehensive, and more destructive of us than the comparatively small stay they were asking for in connection with the photostats this morning.

I respectfully submit that, as your Honor said, this case doesn't differ from another and that it isn't appropriate to ask us, much less to ask the Court, to aid the prosecution in some plans which they have had months to devise and which they haven't as yet brought forward. I respectfully

submit that following the ordinary course there should be an order and then they should deal with it in whatever way they thought wise.

MR. KELLEHER: I don't intend, your Honor, to attempt in any way to narrow the holding this morning. We intend to return the photostats as ordered. I don't intend to make any use of the evidence we have for this criminal case. That is not the issue here. The issue here is simply whether the Court will refrain from acting so that it can correct error if it exists and the appellate court finds it exists, and make that correction in the criminal case. That is simply

all we ask and it seems to me unless defense counsel
485 can assert that they do not intend to put us in the position of having an erroneous order in the record in the criminal case by asserting that because it is in the record, it cannot be corrected, unless defense counsel disavow that, I think this Court should decline to act at this time.

MR. TUTTLE: Here is the prosecution, your Honor, trying to put our clients in jail and in aid of that objective and purpose they are asking us to make stipulations and give them assistance. I think that is extraordinary. I have never heard of it before and, certainly, to ask your Honor in effect to join sides with them in that objective, I don't see how they can ask that of your Honor. Why shouldn't in this case the ordinary practice be to enter an order in conformity with the opinion? There is no question this order is in conformity with the opinion, and then they take whatever steps they see fit. They have never suggested this before in the months this subject has been here in various ways.

MR. KELLEHER: For the first time it has arisen. We are not asking for the aid of the Court, your Honor. We are asking for your Honor not to perform an act which may irrevocably prejudice us in the trial of the criminal case. And until that is decided I merely ask your Honor to refrain from taking a step which may have that effect.

THE COURT: You haven't convinced the Court that you will be prejudiced by the entry at this time of
486 this order in case this order is reversed on the main question involved here, whether the documents and photostats were properly obtained by the Government. As the Court indicated a moment ago, it would seem this order would fall if this order is reversed, Mr. Kelleher, and if, as you are contending, it is sustained by a higher court.

This entry of the order is the usual practice. The Court has entered orders for the Government in these cases where

it has had to. In the application, for example, for bringing in the non-resident defendants the Court issued an order there. The Government thought it should do so under the law, as given to the Court, as the Court understands it. I don't see any reason why this order, there being no objection to form, shouldn't be entered like any other order in any other case.

Mr. KELLEHER: If your Honor please, the other orders which I believe your Honor referred to here are orders which didn't prejudice us or would not prejudice the trial of the case.

The COURT: I don't see how this is going to prejudice you in some other case, and this Court is only concerned with 6070 at this time, as I understand it.

Mr. KELLEHER: I don't see why we should divorce the fact that we have a companion case on which we are going to contest this issue.

487 The COURT: Apparently we are not getting far. We can't agree. I am going to follow the same procedure I followed this morning for the same reasons and it is the usual practice in this district to enter orders. So the order will be entered.

Mr. EDWARDS: There are two other orders to be entered; which Mr. Kelleher has prepared, and I will state there is no objection as to form or as to their entry at *this* time.

The COURT: What are they?

Mr. KELLEHER: These are the orders, if it please the Court, in Civil Action No. 705 denying the defendants' motions for bills of particulars and their motions to dismiss the complaint for lack of jurisdiction over the person and for improper venue and the motions to rescind orders entered by this Court on July 23, 1947.

The COURT: There is no objection as to the form of those?

Mr. EDWARDS: No objection as to form, your Honor.

The COURT: Anything else, gentlemen?

Mr. EDWARDS: Not on our part, your Honor.

The COURT: We will adjourn until ten o'clock tomorrow morning.

(Adjourned at 3:10 P. M.)

488 I hereby certify that the foregoing, Pages 1 to 69 inclusive, is a true and accurate transcript according to my stenographic notes.

EUNICE J. ARCHAMBAULT,
Official Reporter.

489

In United States District Court

Affidavit in Opposition to The Motion for Production of Documents Under Rule 34; and in Reply to Affidavit of Chalmers Hamill, Verified April 10, 1948.
Filed April 30, 1948.

FREDERICK G. MERCKEL, being duly sworn upon his oath deposes and says that:

1. I am employed by the corporate defendants named herein (other than Builders Iron Foundry) in the capacity of Executive Assistant and have been for over fifteen years.

2. I respectfully submit that this motion should be denied for the reasons hereinafter stated, and also that the affidavit of Mr. Hamill, verified April 10, 1948, should be held irrelevant and, in view of the matters of record set forth in the affidavit of William H. Edwards submitted herewith, should also be held immaterial.

3. I further submit that this motion and the "Appendix" on which it is based, and the affidavit of Mr. Hamill, show on their face and as a necessary deduction that the Anti-Trust Division has, in support of this motion and in the preparation of such Appendix and affidavit, made and is making an illegal and unconstitutional use of the documents and the information contained therein which have already been held by this Court to have been illegally and unconstitutionally seized and which information
 490 this Court has already, by a decision rendered prior to the institution of this motion and by order entered on April 20, 1948, precluded and restrained the Anti-Trust Division from using in any way or for any purpose.

4. I respectfully submit that the facts fully justify the foregoing grounds of protest.

The aforesaid Appendix bases itself on a series of numbers set forth in the first column and arbitrarily selected by the Anti-Trust Division *after* it had illegally obtained possession of the documents themselves,—such selection by the Anti-Trust Division being for the purpose of making an Office Record for itself in Rhode Island by way of designating according to these serial numbers and for the Division's use the documents themselves. The said numbers thus assigned by the Division and recorded in its so-called Office Record do not reproduce any numbers appearing on the documents when, under compulsion of the subpoenas issued by the illegally constituted Grand Jury, they were delivered by the defendants in Rhode Island.

The said Appendix and Mr. Hamill's affidavit in describing the same then assume to make a cross-reference from the numbers so selected and set up by the Anti-Trust Division in its Office Record to other numbers which had been placed by these defendants on the documents, so delivered in Rhode Island, *after* the service of the subpoenas by the illegally constituted Grand Jury and *after* such documents had come under compulsion of such subpoenas.

In other words, the said Appendix and Mr. Hamill are endeavoring to support this motion to produce and to obtain the judicial granting thereof by using information which was solely contained in and solely derivable
491 from the illegally and unconstitutionally seized documents and the use which the Anti-Trust Division had made thereof during the period that it unlawfully had access thereto.

Indeed, no other support for such motion is attempted and the motion itself rests solely and exclusively on the information thus illegally obtained, set forth and used.

5. Thus, the obvious facts are that the figures set forth in the first column of the Appendix cannot be used to identify the documents sought to be produced, because they are in no way physically connected therewith; and that the means of identification furnished by the movant are the aforesaid numbers placed by the defendants themselves on the documents after the illegal compulsion had become operative.

Deponent, therefore, submits that this motion to produce proceeds, and necessarily must proceed, upon a violation of the constitutional rights of the defendants for, as declared by the Circuit Court of Appeals for the First Circuit in *Rogers v. United States*, 97 F. (2d) 691, the Government is precluded, where it has seized documents in violation of the Fourth Amendment, from using such documents "at all—even as a means for drafting subpoenas describing the papers sought to be produced".

6. Furthermore, it should be noted on the record that the subpoena issued in 1945 by the New Jersey Grand Jury was directed to and served upon only one defendant corporation, to wit: Wallace & Tiernan Company, Inc., whereas the subpoenas issued in 1946 by the aforementioned special Grand Jury were directed and served upon Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and Novadel-Agene Corporation. In complying with the subpoena

492 issued by the New Jersey Grand Jury deponent caused to be produced for examination by attorneys for the Department of Justice only material coming within the purview of the Wallace & Tiernan Company, Inc., subpoena and germane thereto. All Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and Novadel-Agene Corporation documents called for by this Motion to Produce and its Appendix were, therefore, submitted for the first time in response to the illegal subpoenas issued by the aforementioned special Grand Jury, each and every one of which were ordered returned to defendants by orders of this Court, dated March 19, 1947, and February 18, 1948.

FREDERICK G. MERCKEL /s/

Sworn to before me this
29th day of April, 1948.

FREDERICK E. DONALDSON /s/

Notary Public in the State of New York
residing in New York County.

N. Y. Co. Clk's. No. 319, Reg. No. 356-D-9.

Commission Expires March 30, 1949.

(L. S.)

April 30, 1948

Service of the above affidavit is hereby acknowledged.

GEORG F. TROY,
U. S. Attorney.

493. In United States District Court

Answer of the Defendants, Wallace & Tiernan Company, Inc., Wallace & Tiernan Products Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peel, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck—Filed April 30, 1948

A.

THESE DEFENDANTS DENY EACH AND EVERY AVERMENT OF THE COMPLAINT, EXCEPT AS HEREINAFTER STATED.

B.

THESE DEFENDANTS ADMIT THE FOLLOWING AVERMENTS CONTAINED IN THE COMPLAINT:

1. As to paragraph "3", that the corporations listed (except Builders Iron Foundry) are incorporated in the

state, and have their principal office, as set opposite their names; that W & T is engaged principally in the manufacture, sale and servicing of chlorinating equipment; that W & T Sales is engaged principally in selling the products and services of W & T, W & T Products, Novadel and Industrial.

2. As to paragraph "4", that W & T owns 40% of the voting stock of defendant, Novadel, and that defendant, Novadel, owns all of the capital stock of defendant, Industrial.

494 3. As to paragraph "5", that each of the individual defendants (other than the defendant Chafee) whose name and address is there set forth is associated with or employed by one or more of the corporate defendants and holds the official title or position shown opposite their names except that defendants, Hutton, Pisani and Schenck, hold the described positions only in defendant corporations W & T and W & T Sales.

4. As to paragraph "6", all the averments.

5. As to paragraph "7", that a hypochlorinator is designed to utilize chlorine in the form of hypochlorite.

6. As to paragraph "8", all except those in subparagraph (4).

7. As to paragraph "9", that defendant, W & T, manufactures chlorinating equipment in its plant located at Belleville, New Jersey.

8. As to paragraph "10", that gas chlorinating equipment is purchased and used by the Federal Government and by state, municipal and other local governments primarily for use in the purification of water and sewage.

9. As to paragraph "11", that some sales of gas chlorinating equipment are made in connection with contracts for the installation of water purification systems.

10. As to paragraph "12", that gas chlorinating equipment is used by flour milling companies in the artificial ageing and bleaching of wheat flour.

11. As to paragraph "13", that gas chlorinating equipment is used in the raw food industry to control the decay of food.

12. As to paragraph "14", that gas chlorinating equipment is employed by paper and textile mills and by laundries to utilize chlorine as a bleach and by various
495 industrial plants for the purpose of sterilization and desliming of condensers and other water equipment.

13. As to paragraph "17", that hypochlorinators are purchased extensively by private concerns and individuals

for the purification of water and sewage and for use in swimming pools.

14. As to paragraph "27", that defendant, W & T, instituted suit against the Village of Leroy, New York, for infringement of Patent No. 1,007,647 and that the Court held the patent valid and infringed.

15. As to paragraph "31", that on or about July 30, 1940, defendant, W & T, instituted a patent infringement suit against the Borough of Ephrata, Pennsylvania, and one John Lewis, a contractor, for alleged patent infringement. That the case was dismissed by the Court on November 21, 1945.

16. As to paragraph "37", the last sentence thereof.

17. As to paragraph "39", that defendant Novadel, on August 16, 1938, filed a suit for patent infringement against Frederick H. Penn.

18. As to paragraph "43", that on April 21, 1938, defendants Builders and W & T Products entered into license agreements under which W & T Products acquired a non-exclusive license under Builders Telemetering patents and W & T Products licensed Wallace's then pending patent application Serial No. 588,595 to Builders.

C.

THESE DEFENDANTS ARE WITHOUT KNOWLEDGE OR INFORMATION SUFFICIENT TO FORM A BELIEF AS TO THE TRUTH OF THE FOLLOWING AVERMENTS:

496 19. As to paragraph "1", all therein.

20. Those with respect to defendant Builders Iron Foundry and "Props" in paragraphs "2", "3", "18" and "19".

21. Those with respect to defendant, Henry S. Chafee, in paragraph "5".

22. Those averments in: (a) the last sentence of paragraph "10"; (b) the third sentence of paragraph "14"; (c) paragraph "15"; (d) the first sentence of paragraph "16"; (e) the last sentence of paragraph "18"; and (f) the last sentence of paragraph "19" of the complaint.

23. As to Fairbanks, Morse & Co. as set forth in paragraph "20".

24. As to Hellige, Inc., as set forth in paragraph "21".

25. As to Schutte & Koerting Company as set forth in paragraph "22".

D.

26. AS TO THE AVERMENTS IN THE PARAGRAPHS "26", "28", "33", "34", THE FIRST SENTENCE OF PARAGRAPH "29" AND THE FIRST AND LAST SENTENCES OF PARAGRAPH "35":

These answering defendants do not respond thereto because such averments constitute and reflect use by the plaintiff of papers and documents which were unlawfully and unconstitutionally seized and taken possession of by the plaintiff, and which have heretofore been held by this Court to have been so unlawfully and unconstitutionally seized and possessed, and as to which this Court has heretofore precluded and restrained the plaintiff from making any use in any way or for any purpose of such papers and documents or any information or evidence contained therein or obtained therefrom. The refusal of these defendants 497 to respond to such unlawfully asserted averments is not to be deemed an admission of the truth thereof either directly or indirectly, and hence, as permitted by Rule 8 (d) of the Federal Rules of Civil Procedure, such averments shall be taken as denied.

WHEREFORE, these defendants pray that the complaint be dismissed with costs.

By their Attorneys,

(Sgd) WILLIAM H. EDWARDS.

(Sgd) GERALD W. HARRINGTON.

(Sgd) EDWARDS & ANGELL.

15 Westminister Street,
Providence 3, Rhode Island

CHARLES H. TUTTLE,

LOREN N. WOOD,

JOSEPH C. CORNWALL,

JOHN V. KEAN.

Of Counsel.

April 30, 1948

Service of the above Answer is hereby acknowledged.

GEORGE L. TROY, /s/
U. S. Attorney.

Answer of the Defendants, Novadel-Agenc Corporation and Industrial Appliance Corporation—Filed April 30, 1948.

A.

THESE DEFENDANTS DENY EACH AND EVERY AVERMENT OF THE COMPLAINT, EXCEPT AS HEREINAFTER STATED.

B.

* THESE DEFENDANTS ADMIT THE FOLLOWING AVERMENTS CONTAINED IN THE COMPLAINT.

1. As to paragraph "3", that the corporations listed (except Builders Iron Foundry) are incorporated in the state, and have their principal office, as set opposite their names; that W & T is engaged principally in the manufacture, sale and servicing of chlorinating equipment; that W & T Sales is engaged principally in selling the products and services of W & T, W & T Products, Novadel and Industrial.

2. As to paragraph "4", that W & T owns 40% of the voting stock of defendant, Novadel, and that defendant, Novadel, owns all of the capital stock of defendant, Industrial.

3. As to paragraph "5" that each of the individual defendants (other than the defendant Chafee) whose name and address is there set forth is associated with or employed by one or more of the corporate defendants and 499 holds the official title or position shown opposite their names except that defendants, Hutton, Pisani and Schenck, hold the described positions only in defendant corporations W & T and W & T Sales.

4. As to paragraph "6", all the averments.

5. As to paragraph "7", that a hypochlorinator is designed to utilize chlorine in the form of hypochlorite.

6. As to paragraph "8", all except those in subparagraph (4).

7. As to paragraph "9", that defendant, W & T, manufactures chlorinating equipment in its plant located at Belleville, New Jersey.

8. As to paragraph "10", that gas chlorinating equipment is purchased and used by the Federal Government and by state, municipal and other local governments primarily for use in the purification of water and sewage.

9. As to paragraph "11", that some sales of gas chlorinating equipment are made in connection with contracts for the installation of water purification systems.

10. As to paragraph "12", that gas chlorinating equipment is used by flour milling companies in the artificial ageing and bleaching of wheat flour.

11. As to paragraph "13", that gas chlorinating equipment is used in the raw food industry to control the decay of food.

12. As to paragraph "14", that gas chlorinating equipment is employed by paper and textile mills and by laundries to utilize chlorine as a bleach and by various industrial plants for the purpose of sterilization and desliming of condensers and other water equipment.

13. As to paragraph "17", that hypochlorinators are purchased extensively by private concerns and individuals for the purification of water and sewage and for use in swimming pools.

14. As to paragraph "27", that defendant, W. & T, instituted suit against the Village of LeRoy, New York, for infringement of Patent No. 1,007,647 and that the Court held the patent valid and infringed.

15. As to paragraph "31", that on or about July 30, 1940, defendant, W & T, instituted a patent infringement suit against the Borough of Ephrata, Pennsylvania, and one John Lewis, a contractor, for alleged patent infringement. That the case was dismissed by the Court on November 21, 1945.

16. As to paragraph "37", the last sentence thereof.

17. As to paragraph "39", that defendant Novadel, on August 10, 1938, filed a suit for patent infringement against Frederick J. Penn.

18. As to paragraph "43", that on April 21, 1938, defendants Builders and W & T Products entered into license agreements under which W & T Products acquired a non-exclusive license under Builders Telemetering patents and W & T Products licensed Wallace's then pending patent application Serial No. 588,595 to Builders.

C.

THESE DEFENDANTS ARE WITHOUT KNOWLEDGE OR INFORMATION SUFFICIENT TO FORM A BELIEF AS TO THE TRUTH OF THE FOLLOWING AVERTMENTS:

19. As to paragraph "47", all therein.

20. Those with respect to defendant Builders Iron Foundry and Props in paragraphs "2", "3", "18" and

21. Those with respect to defendant, Henry S. Chafee, in paragraph "5".

22. Those averments in: (a) the last sentence of paragraph "10"; (b) the third sentence of paragraph "14"; (c) paragraph "15"; (d) the first sentence of paragraph "16"; (e) the last sentence of paragraph "18"; and (f) the last sentence of paragraph "19" of the complaint.

23. As to Fairbanks, Morse & Co. as set forth in paragraph "20".

24. As to Hellige, Inc., as set forth in paragraph "21".

25. As to Schutte & Koerting Company as set forth in paragraph "22".

D.

26. AS TO THE AVERMENTS IN THE PARAGRAPHS "26", "28", "33", "34", THE FIRST SENTENCE OF PARAGRAPH "29" AND THE FIRST AND LAST SENTENCES OF PARAGRAPH "35".

These answering defendants do not respond thereto because such averments constitute and reflect use by the plaintiff of papers and documents which were unlawfully and unconstitutionally seized and taken possession of by the plaintiff, and which have heretofore been held by this Court to have been so unlawfully and unconstitutionally seized and possessed, and as to which this Court has heretofore precluded and restrained the plaintiff from making any use in any way or for any purpose of such papers and documents or any information or evidence contained therein or obtained therefrom. The refusal of these defendants to respond to such unlawfully asserted averments is not to be deemed an admission of the truth thereof either directly or indirectly, and hence, as permitted by Rule 8 (d) of the Federal Rules of Civil Procedure, such averments shall be taken as denied.

WHEREFORE, these Defendants pray that the Complaint be dismissed with costs.

By their Attorneys,

EDWARD T. HOGAN,

LAURENCE J. HOGAN,

HOGAN AND HOGAN,

Grosvenor Building,

Providence 3, Rhode Island.

Due and legal service hereof is acknowledged.

JOSEPH L. BARRY,

Assistant U. S. Attorney.

April 30, 1918

502 In District Court of the United States
No. CIV, 705

UNITED STATES OF AMERICA

VS.

WALLACE & TIERNAN COMPANY, INC., ET AL.

Civil Subpoena Duces Tecum

To Fairbanks, Morse & Company
600 S. Michigan Street
Chicago, Illinois

YOU ARE HEREBY COMMANDED to appear in the DISTRICT COURT OF THE UNITED STATES for the District of Rhode Island, at the Courthouse, in the city of Providence, in said District, on the 26th day of May A. D. 1948, at 10 o'clock A. M. of said day, and also that you bring with you and produce at the time and place aforesaid the documents listed, designated and described in Exhibit A attached hereto:

Exhibit A

1. Letter, from G. C. Worthley to F. V. Roy, dated April 4, 1931.
2. Letter, from F. V. Roy to G. C. Worthley, Manager, Scale Division, dated April 6, 1931.
3. Letter, from Manager, Scale Division to E. & T. Fairbanks & Co., dated May 6, 1931.
4. Letter, from T. Fairbanks & Co. to F. V. Roy, dated May 8, 1931.
5. Letter, from F. V. Roy to G. C. Worthley, Manager, Scale Division, dated May 18, 1931.
6. Letter, from G. C. Worthley to Roy, dated May 21, 1931.
7. Letter, from Worthley to Roy, dated June 17, 1931.
8. Letter, from Roy to Worthley, dated June 23, 1931.
9. Letter, from Roy to Brittain, dated June 23, 1931.
10. Letter, from Brittain to Roy, dated June 26, 1931.
11. Letter, from Roy to Brittain, dated July 8, 1931.
12. Letter, from Roy to Worthley, dated July 8, 1931.
13. Letter, from Roy to Worthley, dated July 10, 1931.
14. Letter, from Roy to Ashcraft, dated July 10, 1931.
15. Letter, from G. C. Worthley to J. E. Brittain, Vice-President, Canadian Fairbanks Morse Co., dated July 10, 1931.
16. Letter, from A. E. Ashcraft to F. V. Roy, dated July 13, 1931.

17. Letter, from F. V. Roy to G. C. Worthley, dated July 14, 1931.
18. Letter, from F. V. Roy to G. C. Worthley, dated July 24, 1931.
19. Letter, from G. C. Worthley to F. V. Roy, dated July 27, 1931.
20. Letter, from G. C. Worthley to W. D. Clark, dated August 3, 1931.
21. Letter, from G. C. Worthley to F. V. Roy, dated August 13, 1931.
22. Letter, from F. V. Roy to G. C. Worthley, dated August 21, 1931.
23. Letter, from Worthley to Roy, dated October 16, 1931.
24. Letter, from Roy to Worthley, dated October 21, 1931.
25. Letter, from Nugent to Chicago office Fairbanks, Morse & Co., dated October 22, 1931.
26. Letter, from Worthley to Bousfield, dated October 23, 1931.
27. Letter, from Worthley to Nugent, dated October 23, 1931.
28. Letter, from Nugent to Fairbanks, Morse & Co., Chicago, dated October 18, 1931.
29. Letter, from Roy to Worthley, dated November 2, 1931.
30. Letter, Nugent to Fairbanks, Morse & Co., Chicago, dated November 2, 1931.
31. Letter, from A. B. Jacobus to E. & T. Fairbanks & Co., dated November 2, 1931.
32. Letter, from F. V. Roy to A. B. Jacobus, dated November 6, 1931.
33. Letter, from G. C. Worthley to F. V. Roy, dated November 6, 1931.
34. Letter, from F. V. Roy to Fairbanks, Morse & Co., Kansas City, dated November 9, 1931.
35. Letter, from F. V. Roy to G. C. Worthley, dated November 10, 1931.
36. Letter, from F. V. Roy to G. C. Worthley, dated November 18, 1931.
37. Letter, from G. C. Worthley to F. V. Roy, dated December 4, 1931.
38. Letter, from A. B. Jacobus to G. C. Worthley, dated March 11, 1932.
39. Letter, from Jacobus to Worthley, dated March 23, 1932.

40. Letter, from Lewis to Jacobus, dated April 4, 1932.
41. Letter, from Jacobus to Lewis, dated April 6, 1932.
42. Letter, from Jacobus to Worthley, dated April 6, 1932.
43. Letter, from Jacobus to Bousfield, dated April 6, 1932.
44. Letter, from Bousfield to Jacobus, dated April 8, 1932.
45. Letter, from Worthley to Jacobus, dated April 9, 1932.
46. Letter, from Worthley to Jacobus, dated April 15, 1932.
47. Letter, from Jacobus to Bousfield, dated April 20, 1932.
48. Letter, from A. B. Jacobus to G. C. Worthley, dated April 30, 1932.
49. Letter, from A. B. Jacobus to G. C. Worthley, dated April 20, 1932.
50. Letter, from A. Bousfield to A. B. Jacobus, dated April 22, 1932.
51. Letter, from Jacobus to Bousfield, dated April 25, 1932.
52. Letter, from Jacobus to Drennen, dated April 27, 1932.
53. Letter, from Jacobus to Drennen, dated April 27, 1932.
54. Letter, from Worthley to Jacobus, dated April 27, 1932.
55. Letter, from T. W. Drennen to A. J. Jacobus, dated May 9, 1932.
56. Letter, from E. E. Pendray to A. C. Dodge, dated May 17, 1932.
57. Letter, from A. B. Jacobus to T. W. Drennen, dated May 17, 1932.
58. Letter, from A. B. Jacobus to A. C. Dodge, dated May 17, 1932.
59. Letter, from Jacobus to Dodge, dated May 17, 1932.
60. Letter, from Dodge to Jacobus, dated May 25, 1932.
61. Letter, from Dodge to Pendray, dated May 25, 1932.
62. Letter, from Jacobus to Dodge, dated June 9, 1932.
63. Letter, from Drexelius to Worthley, dated March 6, 1937.
64. Letter, from Worthley to Drexelius, dated March 9, 1937.
65. Letter, from Drexelius to Worthley, dated June 9, 1937.

66. Letter, from Jacobus to Worthley, dated August 4, 1937.
67. Letter, from Townsend to Jacobus, dated January 27, 1938.
68. Letter, from Worthley to Drexelius, dated April 15, 1938.
69. Letter, from Townsend to Fairbanks, Morse, N. Y., dated May 7, 1938.
70. Letter, from Drexelius to Worthley, dated July 25, 1938.
71. Letter, from Drexelius to Townsend, dated July 25, 1938.
72. Letter, from Jacobus to Worthley, dated July 26, 1938.
73. Letter, from Worthley to Drexelius, dated July 27, 1938.
74. Letter, from Worthley to Jacobus, dated July 28, 1938.
75. Letter, from Worthley to Drexelius, dated October 14, 1938.
76. Letter, from Drexelius to Worthley, dated October 20, 1938.
77. Letter, from Worthley to Drexelius, dated October 31, 1938.
78. Letter, from Worthley to Drexelius, dated November 21, 1938.
79. Letter, from Drexelius to Worthley, dated December 12, 1938.
80. Letter, from Drexelius to Worthley, dated January 20, 1939.
81. Letter, from Worthley to Drexelius, dated May 16, 1939.
82. Letter, from Worthley to Drexelius, dated June 5, 1941.

502 then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein United States of America is Plaintiff and Wallace & Tiernan Company, Inc., *et al.*, is Defendant.

WITNESS, the Honorable JOHN P. HARTIGAN, District Judge of the United States, this 12th day of May A. D. 1948

(L S)

NEALE D. MURPHY,

Clerk.

By

Deputy Clerk.

Return on Service

Received this writ at Chicago, Ill., on May 14-48 and on May 18/48, at Chicago, Ill., I served it on the within-named Fairbanks, Morse & Company by serving A. L. Stoddard, Atty., as agent and left a true copy thereof or a subpoena ticket with the person named above.

NORTHERN DISTRICT OF ILLINOIS

MARSHAL'S FEES

Travel in lieu \$20

Service fee . . . 50

\$ 70

T. P. O'DONOVAN,

U. S. Marshal.

By EDWARD F. GLASER,

Deputy.

503

In District Court of the United States

No. Civ. 705

UNITED STATES OF AMERICA

VS.

WALLACE & TIERNAN COMPANY, INC., et al.

Civil Subpoena Duces Tecum

To Hellige, Inc.

3718 Northern Boulevard

Long Island City, N. Y.

YOU ARE HEREBY COMMANDED to appear in the DISTRICT COURT OF THE UNITED STATES for the District of Rhode Island, at the Courthouse, in the city of Providence, in said District, on the 26th day of May A. D. 1948, at 10 o'clock A. M. of said day, and also, that you bring with you and produce at the time and place aforesaid the documents listed, designated and described in Exhibit A attached hereto:

Exhibit A

I. The originals of the following documents:

1. Letter, from Peet to Hellige, dated July 28, 1931.
2. Letter, from Peet to Hellige, dated January 27, 1938.
3. Letter, from Peet to Hellige, dated February 1, 1938.
4. Letter, from Wallace & Tiernan Products, Inc. to Hellige, Inc., dated June 22, 1938.

5. Letter, from Griffin to Hellige, dated February 24, 1939.
6. Letter, from A. E. Griffin to Hellige, Inc., dated April 12, 1939.
7. Letter, from Ever-on Mfg. Co. to Hellige, Inc., dated April 25, 1939.
8. Letter, from Wallace & Tiernan Products, Inc. to Hellige, Inc., dated November 28, 1939.
9. Letter, from Peet to Hellige, dated December 14, 1939.
10. Purchase Order #26539, from Everson Mfg. Co. to Hellige, Inc., dated February 12, 1940.
11. Letter, from G. D. Peet to Dr. Paul E. Hellige, dated June 19, 1940.
12. Letter, from Peet to Hellige, dated June 24, 1940.
13. Letter, from McDonald to Hellige, dated June 24, 1940.
14. Letter, from Gerald D. Peet to Dr. P. A. E. Hellige, dated June 27, 1940.
15. Letter, from Gerald D. Peet to Dr. P. A. E. Hellige, dated July 3, 1940.
16. Letter, from Hutton to Hellige, dated September 30, 1940.
17. Letter, from Peet to Hellige, dated October 28, 1940.
18. Letter, from Hutton to Hellige, dated October 28, 1940.
19. Letter, from Peet to Hellige, dated October 28, 1940.
20. Letter, from Hutton to Hellige, dated December 5, 1940, and attached letter of agreement, from Gerald D. Peet to Hellige Inc., dated November 29, 1940.
21. Letter, from Peet to Hellige, dated December 5, 1940.
22. Letter, from McDonald to Hellige, dated December 16, 1940.
23. Letter, from Peet to Hellige, dated April 29, 1941, and copy attached thereto of letter from Hutton to Howe & French, Inc., dated April 29, 1941.
24. Letter, from Peet to Hellige, dated April 29, 1941.
25. Memorandum, entitled "Wallace & Tiernan commissions," dated 7/9/41.
26. Letter, from Peet to Hellige, dated July 31, 1941.
27. Document, entitled "Hellige, Inc. Comparators for Chlorine Determinations."

II. Carbon copies of the following documents:

1. Letter, from Hellige to Wallace & Tiernan, dated June 14, 1934.

2. Memorandum of conference, by Peet, dated February 1, 1938.
3. Letter, from Hellige to Tiernan, dated August 29, 1938.
4. Letter, from L. W. Hoshour to Wallace & Tiernan Products, Inc., dated January 19, 1939.
5. Letter, from L. W. Hoshour to Wallace & Tiernan Products, Inc., dated April 3, 1939.
6. Letter, from Hellige, Inc. to Everson Mfg. Co., dated April 29, 1939.
7. Letter, from Hellige, Inc. to Everson Mfg. Co., dated February 15, 1940, and enclosed bulletin #605.
8. Letter, from Dr. P. A. E. Hellige to G. D. Peet, dated June 14, 1940.
9. Letter, from Hellige, Inc. to Wallace & Tiernan Products, Inc., dated June 18, 1940.
10. Letter, from Hellige to Peet, dated June 26, 1940.
11. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 27, 1940.
12. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 27, 1940, together with a two-page memorandum attached to the letter, entitled "Builders Iron Foundry orders cancelled by Hellige, Inc." and dated 6/27/40.
13. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 27, 1940.
14. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 29, 1940, and enclosure described as "Enc. #602, Proof Sheet."
15. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated July 5, 1940.
16. Letter, from Hoshour to Wallace & Tiernan, dated September 23, 1940.
17. Letter, from Hellige to Hutton, dated October 3, 1940.
18. Letter, from Hellige to Hutton, dated November 4, 1940.
19. Letter, from L. W. Hoshour to Wallace & Tiernan Products, Inc., dated December 11, 1940.
20. Letter, from L. W. Hoshour to Wallace & Tiernan Products, Inc., dated January 9, 1941.
21. Letter, from Hoshour to Hutton, dated April 8, 1941.
22. Letter, from Hellige to Peet, dated April 15, 1941.
23. Letter, from Hellige to Peet, dated April 24, 1941.
24. Letter, from Hellige to Peet, dated April 30, 1941.
25. Letter, from Hellige to Peet, dated August 28, 1941.

then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein United States of America is Plaintiff and Wallace & Tiernan Company, Inc., *et al* is Defendant.

WITNESS, the Honorable JAMES P. HARTIGAN District Judge of the United States, this 12th day of May A. D. 1948.

L/S

NEALE D. MURPHY,
Clerk.

By:
Deputy Clerk.

Return on Service

Received this writ at Brooklyn, N. Y. on 5-13-48 and on 5-14-48, at 5-25 P. M., I served it on the within-named Hellige, Inc.—Nathan Golden—Scy—3718 Northern Blvd., Long Island City, New York, and left a true copy thereof or a subpoena ticket with the person named above.

MARSHAL'S FEES

Travel.... \$.....
Service.... \$.....

EUGENE J. SMITH,
U. S. Marshal.
By ROLLO S. CRIGER,
Deputy.

504 In District Court of the United States
No. Civ. 705

UNITED STATES OF AMERICA
vs.

WALLACE & TIERNAN COMPANY, INC., *et al*,
Civil Subpoena Duces Tecum

To Proportioneers, Inc.
9 Coddling Street
Providence, R. I.

YOU ARE HEREBY COMMANDED to appear in the DISTRICT COURT OF THE UNITED STATES for the District of Rhode Island, at the Courthouse, in the city of Providence, in said District, on the 26th day of May A. D. 1948, at 10 o'clock A. M. of said day, and also that you bring with you and produce at the time and place aforesaid the documents produced before the additional grand jury for the November 1945 term of this court and listed, designated and described in Exhibit A attached hereto, said Exhibit A being a photostatic copy of the Government's Office Record of such documents produced by you and photostated by the Government:

*Exhibit A*DOCUMENT AND PHOTOSTAT RECORD
Source

<i>Com- pany</i>	% PROPORTIONEERS, INC.	% Files <i>Folder</i>
----------------------	------------------------	--------------------------

FOLDER 5 C

MATHIESON ALKALI WORKS, INC. 1941 GENERAL
 PROPS Letter from H. N. Armbrust of Props to
 Mathieson—Dated 12/16/41
 “ Letter from A. A. Wood to Herb. Holberg
 —Dated Aug. 18, 1941

FOLDER 5 C

MATHIESON ALKALI WORKS, INC. 1942 GENERAL
 PROPS Letter from Alan Wood to Providence Att.
 J. Corydon—Dated 12/14/42
 “ Letter from Corydon to Rev. A. O. Phinney
 —Dated Feb. 16, 1942
 “ Report to File by H. N. Armbrust Dated
 January 15, 1942

FOLDER 5 C

MATHIESON ALKALI WORKS, INC. 1943 GENERAL
 PROPS Letter from H. E. Hollberg to Alan Wood
 —Dated 10/5/43
 “ Letter from Alan Wood to Hollberg Dated
 Oct. 2, 1943
 “ Letter from Alan Wood to Hollberg Dated
 Sept. 24, 1943

FOLDER 5 C

MATHIESON ALKALI WORKS, INC. 1944 GENERAL
 PROPS Letter from Evans of Mathieson to Holl-
 berg of Props.—2/8/44

FOLDER 5 C

MATHIESON ALKALI WORKS, INC. 1945 GENERAL
 PROPS Memo by H. N. A. Dated November 9, 1945
 “ Letter from Honberg of Props to Mathie-
 son—Dated June 19, 1945
 “ Letter from E. Sergeant to Providence Att.
 R. Lowe—Dated 5/7/45
 “ Printed article on Chlorine Dioxide—A
 Development in Trtmt of Potable Water
 4 sheets

% PROPORTIONEERS, INC. % Files
(Continued)

FOLDER 5 C

MATHIESON ALKALI WORKS, INC., 1945 GENERAL

- PROPS Letter from Alan Wood to Hollberg—
Dated 5/3/45
“ Letter from Hollberg to Alan Wood—
Dated 5/1/45
“ Letter from Alan Wood to Hollberg Dated
April 27, 1945

FOLDER % 5 E

CHEM—FEEDS 1943-1946

- PROPS Report on Conversation of Hollberg, with
Fenn and Johnson of Fenn Mfg. Co., Hart-
ford, Conn., Oct. 16, 1944, at office of
Props in Providence
“ Telephone conversation of Hollberg and
Corydon at Props office—10/25/44
“ Letter from N. Frucht, Patent Lawyer to
Props. Dated Oct. 26, 1944
“ Letter from Grinnell Co. to Props—Dated
Aug. 30, 1943
“ Letter from H. E. Hollberg to The Pease
Co.—Dated 6/1/43
“ Letter from H. E. Hollberg to Mr. Thorne
—Dated 8/28/43
“ Letter from Ed. Johnson to S. O. Thorne—
8/23/43
“ Letter from Alan Wood to H. E. Hollberg
—Dated June 12, 1943
“ Letter from H. E. Hollberg to Alan Wood
—Dated June 5, 1943
“ Letter from Alan Wood to Hollberg Dated
June 2, 1943
“ Letter from John Lizars to R. P. Lowe of
Props—Dated 1/29/43
“ Memo from J. Corydon to Doris Chabot
BIF—Dated 2/16/43

% PROPORTIONEERS, INC. % Files
(Continued)

FOLDER 5 E

CHEM—FEEDS 1943-1946

- PROPS Memo from E. R. Loud to R. P. Lowe—
Dated Feb. 2, 1943
“ Memo from E. R. Loud to H. S. Chafee—
Dated Oct. 16, 1942

FOLDER 5 F

WALLACE & TIERNAN—1941 GENERAL

- PROPS Letter from George Bird of W & T to BIF
 --Dated June 26, 1941
- " Memo from J. Corydon to F. H. Dated
 June 17, 1941
- " Memo from H. E. Hollberg to C. I. Bearse
 --Dated June 13, 1941
- " Letter to all representatives by J. Corydon
 --Dated May 23, 1941
- " Letter from Hoshour of Hellige to Holl-
 berg of Props—5/7/41
- " Report to File Chlor-O-Feeder General
 1941 by J. B. Cook Dated May 5, 1941
- " Letter from Hollberg to Hellige Dated
 May 2, 1941
- " Letter from J. Corydon to Chafee Dated
 April 29, 1941
- " Telegram from Corydon of Props to
 Hutton W & T—Dated 4/26/41
- " Penciled note to Jeff from H. S. C. Dated
 4/24/41
- " Letter from Hollberg of Props to Hutton
 W & T—Dated April 22, 1941
- " Letter from Hutton to Props. Dated April
 18, 1941
- " Letter from Hutton to Props. Dated April
 16, 1941
- " Letter from J. C. to John Lizars—Undated

% PROPORTIONEERS, Inc. % Files

(Continued)

FOLDER 5 F

WALLACE & TIERNAN 1941 GENERAL

- PROPS Letter from Hutton to Chafee Dated April
 14, 1941
- " Letter from Chafee to Hutton Dated April
 16, 1941
- " Letter from J. Corydon to Alan Wood—
 Dated April 3, 1941
- " Letter from Allan Wood to J. Corydon—
 Dated March 29, 1941
- " Page from Water Works and Sewerage
 magazine entitled, "Water and Sewage
 Patents"

- PROPS Letter from Corydon to J. Lizars Dated April 3, 1941
- " Letter from Corydon to J. Lizars No date
- " Letter from Corydon to Hollberg Dated March 8, 1941 2 sheets
- " Memo by J. Corydon at New York to Providence Office—March 8, 1941
- " Letter from Corydon to all hands of office—Dated Mar. 4, 1941
- " Notes by Corydon on Chem-O-Feeder Versus Wallace & Tiernan—1/13/41
- " Article copied from Sewage Works Engineering magazine, Feb. 1941 Sub. New Belt Driven Hypochlorinator
- " Letter from Corydon to Sewage Works Engrg magazine—Dated Feb. 17, 1941 2 sheets
- " Pencil note from Corydon to Lizars—Dated—
- " Letter from Corydon to Carl J. Lauter—Dated Feb. 1, 1941
- " Letter from Carl Lauter to Orchard of W & T—Dated Jan. 28, 1941
- " Letter from Carl Lauter to Corydon Dated Jan. 28, 1941

% PROPORTIONEERS, INC. % Files
(Continued)

FOLDER 5 I

WALLACE & TIERNAN 1941 GENERAL

- PROPS Letter from Wm. Orchard to Corydon—Dated Jan. 31, 1941
- " Telegram from Corydon to Prof. Camp of Mass. Inst. of Tech. 1/30/41
- " Day letters from Corydon to Orchard and Earl Collins of Beach & Pool Magazine—Dated January 30, 1941 Both on same page
- " Letter from Corydon to Carl Lauter—Dated Jan. 29, 1941
- " Letter from Hollberg to Purchasing Dept. Dated Jan. 24, 1941

FOLDER 11-1

R. W. SPARLING 1941 GENERAL

- PROPS Letter from H. N. Armbrust to C. G. Richardson—Dated 29/41

FOLDER

PROPS Section 7

PROPS Letter from Donohue, Doyle & Donohue to
 Props—Att. Hollberg—3/29/44
 Agreement between The Sharples Special-
 ty Co. and John S. Watts—July 26, 1937

FOLDER (7 A)

J. S. WATTS—1941 GENERAL

PROPS Letter from Maude C. Watts to Props—
 Att. Corydon—5/31/41
 Letter from Maude C. Watts to Props Att.
 Corydon—Dated 5/31/41
 Agreement between W & T and John S.
 Watts—Dated Oct. 2, 1934

PROPORTIONEERS, INC.

Files

(Continued)

FOLDER (7 A)

JOHN S. WATTS—1939

PROPS Notes on conference Held Sept. 20, 1939
 between Chafee, Lizars, Lowe and Wein-
 berg at Weinberg's office, Newark, N. J.
 by R. Lowe 2 sheets

FOLDER (7 A)

JOHN S. WATTS—1939

PROPS Letter from Orchard to Chafee Dated July
 11, 1939
 Letter from Orchard to Chafee Dated June
 23, 1939
 Letter from B. M. Weinberg to Props Att.
 B. C. Greenough—4/28/39
 Letter from George Booth of W & T to
 Props—Att. Chafee—2/24/39
 Letter from Chafee to B. M. Weinberg—
 Dated Feb. 22, 1939
 Letter from Chafee to Orchard Dated Feb.
 22, 1939
 Notes by Chafee on meeting between Or-
 chard, Booth and Chafee at Pax Hotel on
 Feb. 24, 1939. 2 sheets
 Letter from Chafee to Orchard Dated Feb.
 16, 1939
 Letter from B. M. Weinberg to BIF
 Dated Feb. 13, 1939

PROPS Letter from Orchard to Chafee Dated Feb.
14, 1939 2 sheets
Letter from John Lizars to Chafee Dated
January 16, 1939

FOLDER

OMEGA MACHINE Co.—1941 GENERAL

PROPS Letter from Chafee of BIF to E. E. Harper
—Aug. 29, 1941

1. Agreements between Watts, John S. and Props.,
6/29/38, 6/29/38.
2. Agreement between Props. and Mrs. Watts, 3/9/44.
3. Agreement between Props. and Wilson Chemical
Feeders Inc., 5/29/45.
4. Agreement between Props. and Sharpless, 7/21/44.

The following minutes from Proportioneers Board of
Directors and Stockholders Meetings:

Book I

Dec. 20, 1937

Dec. 29, 1937

April 20, 1938

June 29, 1938

April 18, 1938 (Letter from Chafee to Commercial Credit
Corp. of Can. Ltd.)

Feb. 22, 1939

April 7, 1939

July 2, 1940

Book II

Feb. 21, 1941

March 12, 1941

April 11, 1941

August 28, 1941

Oct. 29, 1941

Nov. 24, 1941

Dec. 11, 1941

March 30, 1942

June 30, 1942

Oct. 14, 1942

Oct. 21, 1942

Dec. 11, 1942

Dec. 11, 1942 ("Minimum Program" unsigned)

Oct. 26, 1942 (Letter from Proportioneers to BIF,
10/26/42)

Dec. 11, 1942 (Report by Corydon)

Dec. 11, 1942 (Transcript of Dictaphone record by Corydon)

Feb. 12, 1943

Feb. 22, 1943

March 9, 1943

August 13, 1943

Sept. 23, 1943

Oct. 15, 1943 (Memo. from Greenough to Chafee)

Dec. 10, 1943

Jan. 18, 1944

Balance Sheet 1943 (follows Feb. 25, 1944 meeting)

Breakdown of shipments (follows Feb. 25, 1944 meeting)

Feb. 19, 1944 (Letter, from Proportioneers to Luther and Wood—unsigned copy)

March 23, 1944

Outline of Sales attached to May 2, 1944 meeting (undated and unsigned memo)

June 29, 1944

July 17, 1944 (Inter-Office Correspondence, from Hollberg to Directors file)

August 24, 1944

Sept. 25, 1944

Nov. 24, 1944

then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein United States of America is Plaintiff and Wallace & Tiernan Company, Inc., et al is Defendant.

WITNESS, the Honorable JOHN P. HARTIGAN District Judge of the United States, this 12th day of May A. D. 1948.

/s/ NEALE D. MURPHY,

Clerk.

By

Deputy Clerk.

(LS)

Return on Service

United States of America)

District of Rhode Island (

Received this writ at Providence, Rhode Island on May 14, 1948 and on May 14, 1948, at Providence, Rhode Island, I served it on the within-named Proportioneer's Inc., by reading and leaving a true copy thereof in the hands and possession of Henry S. Chafee, Treasurer of Propor-

tioneers, Inc., 9 Coddling Street, Providence, R. I. and paying the lawful witness fee of \$2.20.

MARSHAL'S FEES

Travel... \$06

Service... .50

\$1.56

CHARLES M. ELDRIDGE..

U. S. Marshal.

By WALTER GORDON, /s/

Deputy.

505 In District Court of the United States

No. Civ. 705

UNITED STATES OF AMERICA

VS.

WALLACE & TIERNAN COMPANY, INC., ET AL

Civil Subpoena Duces Tecum

To Builders Iron Foundry
9 Coddling Street
Providence, R. I.

YOU ARE HEREBY COMMANDED to appear in the DISTRICT COURT OF THE UNITED STATES for the District of Rhode Island, at the Courthouse, in the city of Providence, in said District, on the 26th day of May A. D. 1948, at 10 o'clock A. M. of said day, and also that you bring with you and produce at the time and place aforesaid the documents produced before the additional grand jury for the November 1945 term of this court and listed, designated and described in Exhibit A attached hereto, said Exhibit A being a photostatic copy of the Government's Office Record of such documents produced by you and photostated by the Government:

Exhibit A

(1) DOCUMENT AND PHOTOSTAT RECORD
Source

From BIF folder Sec. 1

FOLDER

B I F Memorandum of proposed agreement Between B I F and W & T
—1/23/35

Section 1

Note from C. G. Richardson to Mr. Bartlett—Dated 1/29/35

“ “

Comments from BIF regarding Memo of 1/23/35—Dated 2/9/35

“ “

B I F Letter from B I F to W & T—

(Chafee to Orchard) Dated Feb.
9, 1935

Section 1

Memo of conversation with Mr.
Orchard at Baltimore Hotel,
Dated 7/23/35

(Chafee)

Letter from B I F to W & T
(Orchard) Dated July 25, 1935

Letter from Chafee to Orchard
Dated July 31, 1935

Letter from Orchard to Chafee
Dated August 6, 1935

Letter from Chafee to Orchard
Dated Sept. 30, 1935

Letter from Orchard to Chafee
Dated Dec. 7, 1935

Notes *Re* Telemetering and *Re*
Chlorinating

Letter from Chafee to Orchard
Dated Dec. 13, 1935

Letter from Chafee to Orchard
Dated Feb. 13, 1936

Memo on Chlor-O-Feeding and
Telemetering—2/13/36

Letter from Orchard to Chafee
Dated March 7, 1936

Memo on Conference with Mr.
Orchard and H. S. Chafee at Pa.
Hotel—March 19, 1936

Letter from C. G. Richardson to
Orchard—Dated Sept. 30, 1937

Letter from H. S. Hutton to C.
G. Richardson—Nov. 15, 1937

(2) From B I F folder Sec. 1

B I F Letter from C. G. Richardson to
H. S. Hutton—Dated Dec. 3, 1937

Section 1

Letter from H. S. Hutton to
Chafee—Dated Dec. 21, 1937

Letter from Chafee to Orchard
Dated May 2, 1938

Incomplete New York

Letter from D. J. Purdie to G.
W. Kelsey—Dated 1/16/42

Letter from Alan Wood to G.
W. Kelsey—Dated 11/23/42

Letter from H. E. Hollberg to
L. S. Luther—Dated 11/22/43

B I F Letter from H. E. Hollberg to
Navy Purchasing Office—1/25/43 Section 1
C. K. P.

Letter from D. K. Purdie to
H. E. Hollberg—Dated 2/4/43
C. K. P.

Letter from D. K. Purdie to
G. W. Kelsey—Dated 2/6/43

Letter from G. W. Kelsey to C.
K. Perkins H. E. Hollberg—
Dated 2/5/43

Letter from Gray, Codell and
Jeff Corydon to Alan Wood—
Dated April 6, 1942

Letter from W. S. Codell to Jeff
Corydon G. W. Kelsey—Dated
April 7, 1942

"Specs" 18622-4DR 13099
17X0806(1) NSAF 1/42-Sundry
NSA1 Industrial Dept. Extension of water distribution system
of the Yard—11 sheets

Letter—A. Wood to Hollberg
7/25/44

49-080-45-57-11-NEG

Specifications for Sewage Treatment Plant Equipment (Revised
25 Oct. '45) Continental Air
Forces Headquarters Andrews
Field, Camp Springs, Maryland
—10 sheets

Specifications
Laurelton State Village, Laurelton,
Pa. B. I. M. 5044,121—
2 sheets

(3) From Subpoena Folder—Sec. 2

B I F Dated Sept. 18, 1934

Memo on Conference between
Chafee, Orchard, Bartlett, &
Richardson—2 sheets

Section 1

Memo from Jeff Corydon to H.
S. C., D. M. and D. K. B. Jan.
1, '35

Letter from Chafee to Orchard
Dated Oct. 27, 1934—2 sheets

B I F Notes on Conference Wallace & Tiernan

Section 1

Mr. Orchard, Mr. Peet, H. S. Chafee January 10 and 12, 1935
5 pages (third page missing) —
4 sheets

B I F Letter from H. S. Hutton to Chafee—Dated April 19, 1939

SECTION 4

FOLDER

HISTORY OF OMEGA MACHINE CO.
KELSEY'S REPORT

B I F Comparison of Omega Mfg with Probable B I F Cost—By Kelsey
6 pages

Section 4

Report on Omega Machine Co.
By F. H. Cary—13 pages

Omega Machine Co.—History of Company—5 pages—Aug. 30, 1943

Omega Machine Co.—Comparison of Sales and Principal expenses for years 1937 to August 1943

FOLDER

OMEGA MACHINE CO. GENERAL
1943

Section 4

B I F Telegram from Chafee to Harper
Dated Dec. 31, 1943

Notes—on Mr. L. E. Harper's patents Dated Dec. 16, 1943
9 sheets

Telegram from H. S. Chafee to L. E. Harper—Dated Nov. 11, 1943

4 pages

Memo on Market for Omega Dry Feeders By G. W. Kelsey—Dated Oct. 29, '43

Letter from Chafee to Harper
Dated Oct. 20, 1943

Letter from Chafee to Harper
Dated October 20, 1943

(4)

FOLDER

OMEGA MACHINE CO.—GENERAL

1943

Section 4

B I F Letter from L. E. Harper to H. S. Chafee—Dated Oct. 16, 1943
 Letter from Harper to Chafee Dated Oct. 15, 1943
 Letter from Linn H. Enslow to Harper—Dated Aug. 26, 1943—2 sheets
 Letter from Chafee to Harper Dated Oct. 18, 1943
 Letter from Harper to Chafee Dated October 11, 1943
 Questions to L. E. Harper—4 pages—Dated 10/9/43
 Letter from Chafee to Omega Machine Co.—Dated Oct. 8, 1943
 Letter from Omega Machine Co. to Chafee—Dated Oct. 7, 1943
 Letter from Harper to Chafee Dated 10/9/43—Attached is List of lime slaker sales since 1928, 4 pages.
 Telegram from Chafee to Harper Dated Oct. 6, 1943
 Letter from Chafee to Harper Dated October 6, 1943
 Letter from Chafee to Harper Dated October 6, 1943
 Letter from H. W. Baumgartner to G. W. Kelsey—Dated Oct. 6, 1943
 Memo by W. E. Trauffer
 Letter from G. W. Kelsey to Pit & Quarry—Dated Oct. 5, 1943
 Letter from Kelsey to Harper Dated September 27, 1943
 (Continued)

(5)

FOLDER

OMEGA MACHINE CO.—GENERAL

1943

Section 4

B I F Letter from Harper to Chafee Dated Sept. 25, 1943

B I F Letter from Chafee to Harper
Dated Sept. 24, 1943

Section 4

" Memo from C. G. Richardson to
G. W. Kelsey—Dated Sept. 18,
1943

" Memo from G. W. Kelsey to
Chafee—September 18, 1943 2
sheets

" Pencil notation entitled "Mr.
Wheeler"—9-13-43

" Letter from Carl K. Perkins to
G. W. Kelsey—Dated Sept. 17,
1943

Teletype

" Letter from Carl K. Perkins to
G. W. Kelsey—Dated 9/16/43

Teletype

" Letter from G. W. Kelsey to C. K.
Perkins—Dated 9/16/43

" Letter from G. W. Kelsey to C. K.
Perkins—Dated 9/15/43

" Letter from L. E. Harper to H.
Chafee—Dated Sept. 15, 1943

" Letter from G. W. Kelsey to Alan
Wood—Dated Sept. 10, 1943

" Letter from Chafee to Harper
Dated September 8, 1943

" Letter from Harper to Chafee
Dated August 31, 1943 2 sheets

" Telegram from Chafee to Harper
Dated August 28, 1943

8/28/43

" Memo from E. E. Mason to
Mildred Judge. Title "Omega
Machine Co. Special"

Paper entitled "Omega" dated
8-28-43

" Notes made by Kelsey on talk be-
tween Harper and Kelsey at Lin-
coln Hotel, N.Y.C. Aug. 18, 1943

" Letter from Kelsey to Harper
Dated July 30, 1943

" Letter from Harper to Kelsey
Dated July 28, 1943 2 sheets

FOLDER

EVERSON—OPEN

Section 4

B I F Memo from E. R. Lond to Chafee concerning Everson patents 6/28/44, 2 sheets

“ Letter from Kelsey to G. H. Jewell Dated January 21, 1942

“ Letter from F. W. Kolb to Kelsey Dated January 14, 1942

“ Letter from Alan Wood to Kelsey Dated May 2, 1945

“ Letter from Kelsey to C. T. Henderson—Dated 12/18/44

“ Letter from H. E. Exner to Kelsey—Dated Dec. 16, 1944 2 sheets

“ Letter from C. T. Henderson to G. W. Kelsey—Dated Dec. 13, 1944 3 sheets

“ Letter from C. T. Henderson to G. W. Kelsey—Dated Dec. 10, 1944 2 sheets

“ Letter from Kelsey to Alan Wood Dated 12/7/44

“ Letter from Kelsey to Henderson Dated 12/6/44

“ Letter from Henderson to Kelsey Dated December 1, 1944

“ Letter from Henderson to Kelsey Dated November 28, 1944

“ Letter from Kelsey to Chafee Dated November 17, 1944

“ Memorandum — 11/13/44 — by Kelsey Subject: Chlorination Meeting 2 sheets

“ Letter from Kelsey to William Bardwell—Dated Nov. 3, 1944

“ 10/31/43 Memorandum entitled, “Special Data About Bishop” 2 sheets

“ Letter from Chafee to Harper with attached Memo on Everson Situation—Dated 10/31/44

(7)

FOLDER

EVERSON—OPEN

Section 4

B I F Letter from Kelsey to Chafee
regarding Everson Mfg. Co.
9/18/44

" List of Everson Gross Sales Dated
Sept. 27, 1944

" Notes on Conference 9/4/44
between Bradley, Kelsey, Miner,
Bartlett and Chafee on Everson
Chlorinators 2 sheets

" Letter from Harper to Chafee
Dated Nov. 1, 1944 2 sheets

" Letter from Kelsey to Henderson
Dated Nov. 8, 1944

" Letter from Henderson to Kelsey
Dated Oct. 25, 1944 3 sheets

" Letter from R. B. Everson and
E. S. Bishop to Bardwell 12/8/41

" Letter from Everson to E. S.
Bishop Dated February 7, 1942

" Letter from Kelsey to Chafee
Dated Sept. 18, 1944 2 sheets

" Letter from Kelsey to Chafee
Dated June 3, 1944 2 sheets

" Notes by G. W. Kelsey 3/6/44
Subject: Everson Sterilators

" Letter from W. S. Codell to
Kelsey—Dated March 1, 1944

" Memo—Telephone conversation
with Harold Hutton of W & T—
by Chafee Dated 2/24/44

" Statement on BIF, Props, and
Omega's Policy Relative to Feed-
ing of chlorine gas or liquid. By
Chafee 2/22/44

" Letter from Kelsey to Everson
Dated Dec. 21, 1943

" Letter from Kelsey to Everson
Dated December 13, 1943

" Memo by G. W. Kelsey—
11/26/43—Sub.—Everson Mfg.
Co., Chicago, Ill. 3 pages

(8)

FOLDER

EVERSON & Chlorine Control
Patents

Section 5

B I F Letter from C. Douglas Mercer
to Chafee—Dated November 27,
1944

“ List of Everson Gross Sales “ “

“ Notes by Chafee—11/24/44 on
conference between Mercer,
Bradley Miner, Kelsey and
Chafee. Also two pages of hand
written notes attached.

“ Letter from Kelsey to Bardwell
Nov. 3, 1944. “ “

“ Memo by Kelsey—11/1/44—
Subject: Everson-Bishop Situa-
tion “ “

“ Notes on: “ “

“ Estimate cost of Everson Ster-
elator—Nov. 1, 1943 “ “

“ Notes on Omega Chloroveight “ “

“ Pencil notes dated 10/2/44 of
conference “ “

“ Letter from Kelsey to Chafee
Dated Sept. 18, 1944 “ “

“ Memo on Everson Chlorinators
Dated Sept. 9, 1944 “ “

“ Conference between Bradley,
Kelsey, Miner, Bartlett and
Chafee, 9/4/44 Subject: Everson
Chlorinators 2 sheets “ “

“ Note from Kelsey. “ “

“ Memo on Gas Chlorinators—
Dated June 28, 1944—By Kelsey
4 sheets “ “

“ Memo from E. R. Loud to Chafee
Dated Dec. 18, 1943—Sub. W & T “ “

FOLDER

WALLACE & TIERNAN, 1942 Section 5

B I F Letter from Alan Wood to Kel-
sey Dated Nov. 25, 1942 “ “

“ Letter to W&T Products, Inc.
7/21/42 Att.: G. D. Peet from
E. R. Loud “ “

B I F Letter from I. Gordon of W&T
Products to BIF—Dated May 11,
1942

Section 5

“ Letter from D. J. Purdie to W&T
—Dated Jan. 31, 1942

“ Letter from Kelsey to R. C.
Clement of W&T co.—Dated Jan.
26, 1942

“ Letter from Alan Wood to R. C.
Clement of W&T—Dated Jan.
13, 1942

FOLDER

W & T—1943

B I F Letter from C. D. Peet of W&T
to Chafee of BIF—Dated April
8, '43

FOLDER

WALLACE & TIERNAN—1944

B I F Letter from C. G. Richardson to
G. W. Kelsey—Dated Sept. 26,
1944

“ Letter from J. R. Hartley to
D. J. Purdie—Dated 6/20/44

“ Letter from A. E. Watjen to
Builders, New York, ~~D. J. Purdie~~
—Dated May 12, 1944

“ Letter from D. J. Purdie to
Schenck of W&T—Dated 5/10/44

FOLDER

W&T—1941-1946 Purchase
Orders

B I F Letter from I. O. Miner to
Hutton of W&T—July 23, 1941

“ Letter from R. P. Lowe to Ed.
Loud—Dated

“ Report on Conversation between
Mr. Maurer of Chloramine Co.
and Lowe & Armbrust of Props..
7/22/40 2 sheets

(10). (Continued)

FOLDER

W&T—1941-1946—PURCHASE
ORDERS

Section 5

B I F Memo from I. O. Miner to E. Loud—Dated December 4, 1945 “ “
 “ Memo from E. R. Loud to I. O. Miner—Dated Dec. 28, 1945 “ “
 “ Letter from E. R. Loud to U. S. Print'g & Lithograph'g Co. 12/28/45 “ “
 “ Letter from H. F. Clark of Trade Mark Bureau to E. R. Loud 1/8/46 “ “

FOLDER

W&T—LICENSE REPORTS
1938-1946

Section 5

“ Letter from Gerald Peet of W&T to Chaffee of BIF—4/16/46 “ “

FOLDER

W&T—1939

Section 5

B I F Letter from J. R. MacKay of W&T Products to Chaffee 3/22/39 “ “
 “ Memo written by Lowe 3/21/39 Sub.: W&T visit of Mr. MacKay 2 sheets “ “
 “ Letter from Chaffee to MacKay Dated December 20, 1939 “ “
 “ Letter from Chaffee to MacKay Dated December 12, 1939 “ “
 “ Letter from MacKay to Chaffee Dated December 11, 1939 3 sheets “ “
 “ Letter from Chaffee to MacKay Dated November 20, 1939 “ “
 “ Letter from D. C. of BIF to W & T—Dated October 18, 1939 “ “
 “ Letter from Gerald Peet to Chaffee Dated October 10, 1939 “ “
 “ Memo from Chaffee to E. R. Loud Dated September 14, 1939 “ “
 “ Letter from MacKay to A. E. Watjen Dated August 22, 1939 “ “

(11) (Continued)

FOLDER

WALLACE & TIERNAN 1939 Section 5

B I F Letter from Chafee to Peet Dated
April 17, 1939" Letter from Peet to Chafee Dated
April 11, 1939 2 sheets" Letter from Chafee to MacKay
Date 1 April 5, 1939" Letter from Chafee to M. F.
Tiernan Dated March 9, 1939" Letter from Chafee to Purdie
Dated March 9, 1939" Letter from M. F. Tiernan to
Chafee—Dated March 8, 1939" Letter from MacKay to Chafee
Dated Feb. 27, 1939" Notes on Conference between
Chafee Orchard and Booth—
2/21/39 by Chafee" Letter from Peet to Chafee Dated
Feb. 14, 1939" Letter from MacKay to Chafee
Dated Feb. 7, 1939" Letter from Chafee to Peet Dated
Feb. 3, 1939

FOLDER

WALLACE & TIERNAN COMPANY 1940

B I F Letter from Peet to Chafee Dated
April 8, 1940" Penciled memo from Chafee to
Lond—Dated 5/25/40" Letter from MacKay to Chafee
Dated May 24, 1940 2 sheets" Letter from Chafee to MacKay
Dated May 31, 1940

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FOLDER

OMEGA—CHLOPOWEIGH Section 5

B I F Letter from Chafee to James M.
Montgomery—Dated /August 9,
1940" Letter from Chafee to Harper
Dated Aug. 9, 1940

B I F	Letter from Chafee to E. E. Harper—Dated Aug. 9, 1940	Section 5
"	Letter from Harper to Chafee Dated Aug. 6, 1940	" "

FOLDER

	B.I.F.—OMEGA—INFILCO	Section 5
B I F	Memo by Chafee—Dated 6/26/45	" "
"	Letter from P. N. Engel of Inflico to Chafee—Dated Sept. 22, 1944	" "
"	Letter from Chafee to P. N. Engel Dated Sept. 2, 1944	" "
"	Letter from Chafee to James N. Montgomery—Dated Aug. 28, 1944	" "
"	Memo of Mr. Wheeler's Telephone conversation Relative to L. E. Harper's Patents Dated August 28, 1944	" "
"	Letter from Chafee to Harper Dated August 8, 1944	" "
"	Letter from Harper to Earl Bradley—Dated August 5, 1944	" "
"	Letter from Howland Sargeant of Patent Adm. to Alfred Fuchs 8/3/44	" "
"	Letter from P. N. Engel to Chafee Dated July 31, 1944	" "
"	Letter from Chafee to P. N. Engel Dated July 22, 1944	" "
"	Letter from Chafee to C. E. Wheeler Dated July 21, 1944	" "

(13) (Continued) FOLDER

	B.I.F.—OMEGA—INFILCO	Section 5
B I F	Letter from P. N. Engel of Inflico to Chafee—Dated July 20, 1944	" "
"	Letter from Chafee to P. N. Engel Dated July 15, 1944	" "
"	Letter from Chafee to P. N. Engel—Dated June 7, 1944	" "
"	Letter from P. Engel to Chafee Dated June 5, 1944	" "
"	Letter from Chafee to Engel Dated May 31, 1944	" "

- B-I F Letter from Chafee to James N. Montgomery—Dated June 1, 1944 Section 5
- “ Letter from Earl H. Bradley to J. M. Montgomery—Dated May 30, 1944 “ “
- “ Letter from J. M. Montgomery to Bradley—Dated May 22, 1944 “ “
- “ Letter from Chafee to Harper. Dated June 1, 1944 “ “
- “ Letter from E. R. Lond to Harper—Dated March 7, 1944 “ “
- “ Letter from E. R. Lond to R. J. Leveque of Omega — Dated 4/4/44—2 sheets “ “

FOLDER

- WALLACE & TIERNAN—1941 Orders Section 5
- B I F Letter from H. S. Hutton to I. O. Miner—Dated Aug. 4, 1941 “ “
- “ Letter from Chafee to Peet Dated May 5, 1941 “ “
- “ Letter from B. C. Greenough to Peet of W&T—Dated April 26, 1941 “ “

FOLDER

- OMEGA MACHINE Co.—General 1944 & L. E. H.
- B I F Letter from Chafee to Harper Dated 10/31/44 Section 5

(14) (Continued) FOLDER

- OMEGA MACHINE Co.—GENERAL 1944 & L. E. H.
- B I F Letter from Chafee to Harper Dated 10/31/44 “ “
- “ Notes on Conference on Everson Chlorinators — Dated 9/4/44—2 sheets “ “
- “ Notes on Everson Chlorinators Dated September 9, 1944 “ “
- “ Letter from Chafee to Harper Dated 9/13/44 “ “
- “ Memo—Telephone conversation with L. E. Harper — Dated 9/5/44 “ “
- “ Letter from Chafee to Harper Dated July 17, 1944—2 sheets “ “
- “ Letter from Chafee to Harper Dated June 16, 1944 “ “

B I F Letter from Chafee to Harper
 Dated March 29, 1944—2 sheets Section 5
 " Letter from A. R. Plant to Blk-
 stone Canal National Bank to
 Chafee 3/24/44 " "
 " Letter from A. R. Plant to
 Harper—Dated March 23, 1944 " "
 " Copy of Promissory note from
 Blkstone Canal National Bank
 for Omega Machine Co.—Dated
 3/23/44 " "
 " Notes on the business of Omega
 Machine Co.—sales—stocks, etc.
 —2 sheets " "
 " Letter from L. E. Harper to
 E. E. Harper—Dated Jan. 29,
 1944 " "
 " Statement of 1943 Royalties by
 L. E. Harper—Dated Jan. 17,
 1944 " "
 " Memo on Omega by Chafee
 Dated Jan. 14, 1944 " "
 " Telegram from Earl H. Bradley
 to Harper—Dated Jan. 10, 1944 " "
 " Letter from Chafee to Harper
 Dated Jan. 6, 1944 " "

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FOLDER

OMEGA MACHINE Co.—General 1944 & L. E. H.
 B I F Memo from Omega to Builders
 —Dated 1/5/44 Section 5
 " Letter from Harper to Chafee
 Dated January 3, 1944 " "

FOLDER

E. E. HARPER

B I F List of Omega Patents " "
 " Letter from E. H. Bradley to
 Harper—Dated May 30, 1944 " "
 " Penciled Note dated 2/4/44
 Subject: Omega Patent Agree-
 ment " "
 " Letter from E. R. Loud to Chafee
 Dated June 29, 1945 " "

B I F	Letter from E. H. Bradley to Harper — Dated 12/13/44 — 3 sheets.	Section 5
"	Letter from E. H. Bradley to Harper—Dated. Nov. 15, 1944 —(4 sheets)	" "
"	Letter from E. E. Harper to BIF—Dated Aug. 7, 1944	" "
"	Letter from E. H. Bradley to E. E. Harper—Dated July 20, 1944	" "
"	Letter from Chafee to L. Harper Dated July 20, 1944	" "
"	Letter from Chafee to L. Harper Dated July 19, 1944	" "
"	Letter from E. E. Harper to Omega Machine. Co. — Dated 7/13/44	" "
"	Letter from Chafee to E. Harper — Dated July 4, 1944 — 2 sheets	" "
"	Letter from E. Harper to BIF and Omega Machine Co. — Dated 5/25/44	" "
"	Bradley—Dated May 19, 1944	" "

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(Continued) FOLDER

E. E. HARPER

B I F	Letter from L. Harper to E. H. Bradley of BIF—Dated May 11, 1944—3 sheets	Section 5
"	Letter from E. Harper to E. Bradley — Subject — License Agreements 5/5/44—7 sheets	" "
"	Letter from Chafee to L. Harper Dated May 17, 1944—2 sheets	" "
"	Letter from E. Harper to L. Harper—Dated May 6, 1944—2 sheets	" "
"	Letter from E. Bradley to E. Harper —Dated May 2, 1944	" "
"	Letter from E. Harper to BIF Att. Bradley—Dated April 26, 1944—5 sheets	" "
"	Letter from L. Harper to Chafee, Dated April 24, 1944	" "
"	Letter from E. H. Bradley to E. Harper—Dated April 21, 1944	" "

B I F	Letter from E. Harper to Chafee Dated April 19, 1944—2 sheets	Section 5
"	Letter from E. Harper to Omega Machine Co.—Dated April 18, 1944—3 sheets	" "
"	Letter from L. Harper to Chafee Dated April 18, 1944	" "
"	Letter from L. Harper to E. Har- per—Sub. License Agreement— 4/15/44—3 sheets	" "
"	Letter from L. Harper to E. Har- per—Dated April 18, 1944	" "
"	Letter from E. Harper to Omega Machine Co.—Dated April 8, 1944—5 sheets	" "
"	Letter from L. Harper to E. Har- per—Dated April 4, 1944—3 sheets	" "
"	Letter from E. Harper to Omega Machine Co.—Dated March 29, 1944	" "
"	Letter from L. Harper to Chafee Dated March 15, 1944—2 sheets	" "

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(Continued) FOLDER

E. E. HARPER

B I F	Letter from L. Harper to Chafee Dated March 15, 1944	Section 5
"	Letter from L. Harper to Chafee Dated March 7, 1944—2 sheets	" "
"	Letter from Chafee to L. Harper Dated March 3, 1944	" "
"	Letter from E. Harper to Omega and BIF—Dated Feb. 25, 1944— 3 sheets	" "
"	Letter from Chafee to L. Harper Dated Feb. 17, 1944	" "
"	Letter from Chafee to E. Harper Dated Feb. 17, 1944—2 sheets	" "
"	Letter from E. Harper to Chafee Dated Jan. 31, 1943—3 sheets	" "
"	Letter from E. Harper to L. Har- per—Dated Jan. 27, 1944—2 sheets	" "
"	Letter from L. Harper to E. Har- per—Dated Feb. 14, 1944	" "

B I F Letter from L. Harper to E. Harper—Dated Feb. 7, 1944—2 sheets

Section 5

" Letter from E. Harper to Chafee Dated Jan. 13, 1944—2 sheets

" Letter from L. Harper to Chafee Dated November 11, 1943—3 sheets

" Memo to L. Harper Dated Nov. 4, 1943—By L. Harper

" Letter from E. Harper to Chafee Dated Sept. 28, 1942—2 sheets

FOLDER

E. E. HARPER—1945-1946

B I F Basic Specifications for the design and construction of Machines for metering and feeding liquid Chlorine by Weight or Volume. By E. E. Harper—Jan. 6, 1945—20 pages

Section 5

(18) (Continued) FOLDER

E. E. HARPER—1945-1946

B I F Letter from L. Harper to Earl Bradley—Dated July 31, 1944

Section 5

" Letter from E. H. Bradley to L. Harper—Dated July 29, 1944

" Letter from L. Harper to Chafee Dated July 27, 1944—2 sheets

" Letter from L. H. Enslow to L. Harper Rec'd Dated July 29, 1944

" Letter from Ornstein to Enslow Dated July 14, 1944

FOLDER

AGREEMENT—E. E. HARPER—B I F—OMEGA

AGREEMENT—OMEGA—B I F (Sub-license Montgomery)

B I F Letter from B. G. Greenough of Omega Machine company to J. M. Montgomery—Dated July 2, 1946

Section 5

" Letter from B. Greenough to L. Harper—Dated July 2, 1946

" Letter from B. Greenough of B I F to L. Harper—Dated July 1, 1946

" Letter from B. Greenough to J. M. Montgomery—Dated Jan. 8, 1946

B I F Letter from B. Greenough to
 Letter from B. Greenough to
 Omega Machine Co.—Dated Jan.
 8, 1946

Section 5

Letter from B. Greenough to L.
 Harper—Dated July 2, 1945

Letter from B. Greenough to
 Dept. of Navy, Office of Patents
 and Inventions—Dated May 17,
 1945—2 sheets

Letter from B. Greenough to
 Omega Att. L. Harper—Dated
 July 2, 1945

Letter from B. Greenough to J.
 M. Montgomery—Dated July 2,
 1945

Letter from B. Greenough to
 Omega Att. L. Harper—Dated
 Jan. 10, 1945

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(Continued) FOLDER

AGREEMENT—E. E. HARPER—BIF—OMEGA

AGREEMENT—OMEGA—BIF (Sub-License Montgomery)

B I F Letter from B. Greenough to
 Omega Att. L. Harper—Dated
 July 5, 1944

Section 5

Letter from L. Harper to BIF
 Att. B. Greenough—Dated
 1/12/44

Letter from B. Greenough to
 Omega Att. L. Harper—Dated
 Jan. 10, 1944

Letter from B. Greenough to R.
 Allen—Dated August 23, 1943

Letter from L. Harper to BIF
 Att. Greenough—Dated July 19,
 1943

Letter from B. Greenough to
 Omega Att. L. Harper—Dated
 July 1, 1943

Letter from B. Greenough to
 Omega Att. L. Harper—Dated
 July 1, 1943

Memo from D. R. Chabot to R. P.
 Lowe—Dated March 16, 1943

Letter from L. Harper to D.
 Chabot of BIF—Dated Jan. 13,
 1943

Letter from D. Chabot to L. Har-
 per—Dated Jan. 9, 1943

B I F Letter from L. Harper to B. Greenough of BIF—Dated July 13, 1942

Section 5

Letter from B. Greenough to Omega Att. L. Harper—Dated July 8, 1942

Letter from L. Harper to Greenough—Dated July 6, 1942

Letter from Greenough to L. Harper—Dated July 1, 1942

Letter from R. P. Lowe to George Kelsey—Dated March 18, 1942

Letter from Greenough to L. Harper—Dated Jan. 9, 1942

(20) (Continued) FOLDER

AGREEMENT—E. E. HARPER—BIF—OMEGA

AGREEMENT—OMEGA—BIF (Sub-License Montgomery)

B I F Letter from Greenough to L. Harper—Dated Aug. 29, 1941

Section 5

Letter from Chafee to E. Harper—Dated August 29, 1941

Letter from Greenough to L. Harper—Dated July 10, 1941

Letter from L. Harper to Greenough—Dated Jan. 14, 1941

Letter from Greenough to Omega Att. L. Harper—Dated 1/10/41

Letter from E. R. Loud to Maxwell Barnes—Dated July 19, 1940

FOLDER

SIMPLEX VALVE & METER CO.

GREENFIELD PATENTS—REPORTS AND RELATED M H May 27, 1944—2 sheets

B I F Memo from E. R. Loud to H. S. Chafee—Sub. Simplex Agreements

Memo from E. R. Loud to B. Greenough—Dated August 12, 1940

Memo from E. R. Loud to Mr. Richardson—Dated May 24, 1940

Memo from E. R. Loud to Miss Greenough—Dated April 4, 1940

Memo from C. G. Richardson to A. E. Watien—Dated March 23, 1940

B I F Memo on Simplex Agreement on
Greenfield Patents from B.
Greenough to Mr. Richardson—
Dated 3 18 40

Letter from Everett Jones of
Simplex to C. G. Richardson—
Dated 12 1 41

Letter from Roth and Harveson
of Simplex to B I F—Dated
11 21 41—3 sheets

(21) (Continued) FOLDER

SIMPLEX VALVE & METER CO.

GREENFIELD PATENTS—REPORTS AND RELATED M H

B I F Memo from Chafee to Richard-
son Dated Nov. 28, 1941

Penciled note from Richardson
to Chafee—Dated 11 27 44

Letter from Roth and Harveson
to B I F—Dated November 21,
1941—3 sheets

Letter from Everett Jones of
Simplex to B I F—Dated Sept. 2,
1941

Letter from Roth and Harveson
of Simplex to B I F—Dated Aug.
29, 1941—2 sheets

Letter from Roth and Harveson
of Simplex to B I F—Dated
4 24 41—2 sheets

Photostat of Price List 5 24 41
Instrument with Air Relays

FOLDER

SIMPLEX VALVE & METER CO.—1946—REPORTS

B I F Letter from Roth of Simplex to
Greenough of B I F—Dated 7 5 46

Letter from W. H. Roth to Chafee
Dated Nov. 27, 1940

Letter from W. H. Roth to Chafee
Dated Nov. 4, 1940

Letter from Chafee to W. H. Roth
Dated Oct. 25, 1940

Letter from W. H. Roth to Chafee
Dated October 24, 1940

Letter from Chafee to Simplex
Dated October 17, 1940

Letter from Greenough of B I F to
Simplex—Dated July 8, 1940

Simplex

B I F Letter from ~~W. H. Roth~~ to
B.I.F.
~~Simplex~~ Dated Feb. 21, 1940

FOLDER

SIMPLEX VALVE & METER CO.—
1946 REPORTS

B I F Letter from Everett M. Jones to
C. G. Richardson—Dated 1/12/40
with attached schedule covering
the use of Simplex Air different-
tials principle of meter operation.
Letter from Edmund Borden of
Power Patents Co. to Simplex—
12/7/39

(22) (Continued) FOLDER

SIMPLEX VALVE & METER CO.—
1938-1943

B I F Memo from C. G. Richardson to
Chafee—Dated March 5, 1942
“ Memo from E. R. Lond to Chafee
—Dated March 3, 1942 2 sheets
“ Letter from M. M. Borden of
Simplex to Chafee—Dated Feb.
27, 1942
“ Letter from Chafee to Roth of
Simplex—Dated Feb. 19, 1942

B I F

“ Memo from ~~W. H. Roth~~ to Chafee—
Dated Feb. 12, 1942—2 sheets
“ Memo from C. G. Richardson to
Chafee—Dated Feb. 2, 1942—2
sheets
“ Letter from W. H. Roth of
Simplex to Chafee—Dated Jan.
28, 1942
“ Letter from B. Greenough to
Simplex—Dated Jan. 20, 1942
“ Letter from Greenough to Sim-
plex—Dated Jan. 14, 1942
“ Letter from Chafee to Roth of
Simplex—Dated Jan. 2, 1942

- B I F Letter from Harveson of Simplex to Greenough of B I F—10. 16. 41
- Memo from E. R. Loud to Richardson—Dated Oct. 10, 1941
- Letter from Chafee to Roth of Simplex—Dated Nov. 7, 1940

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(Continued) FOLDER

SIMPLEX VALVE & METER CO.—
1938-1943

- B I F Letter from Roth of Simplex to Chafee—Dated Nov. 4, 1940
- Letter from Greenough to Simplex—Dated July 8, 1940
- Letter from E. R. Loud to Roth—Dated May 25, 1940
- Letter from Greenough to Simplex—Dated April 11, 1940
- Notes by Chafee—Dated 10/18/39
- Sub. Conference in Mr. Barus' Office with Messrs. Roth and Borden of Simplex Co., Mr. Barus and Mr. Chafee
- Notes on Conference between Mr. Borden of Simplex and Chafee of B I F at the Biltmore Hotel, Sept. 25, 1939—By Chafee
- Letter from Chafee to Simplex—Dated March 28, 1939
- Memo of Conversation between Messrs. Roth, Borden and Chafee in New York—December 20, 1938. By Chafee
- Letter from Chafee to Roth of Simplex—Dated Dec. 6, 1938—3 sheets
- Letter from Roth to Chafee—Dated Dec. 5, 1938—2 sheets
- Letter from Chafee to Roth—Dated Dec. 1, 1938—2 sheets
- Letter from Roth to Chafee—Dated Nov. 29, 1938
- Notes written by Chafee 8/16/38
- Subject: Conference between Mr. Roth and Chafee in New York

B I F Letter from F. W. Herring of
American Public Works Assn. to
E. R. Loud—8/16/38

(24) (Continued) FOLDER

SIMPLEX VALVE & METER Co.—
1938-1943

B I F Letter from Chafee to W. H. Roth
—Dated July 23, 1938

Letter from Greenough to Sim-
plex—Dated Jan. 21, 1938

FOLDER

SIMPLEX VALVE & METER Co.—
1936-1938

B I F Letter from Richardson to Roth
—Dated October 31, 1938

“ Letter from Richardson to E. M.
Jones of Simplex—Dated 6/1/38

“ Letter from C. G. Richardson to
Simplex—Att. Jones—12/20/36

“ Letter from E. M. Jones to C. G.
Richardson—Dated Nov. 21, 1938

“ Letter from C. G. Richardson to
E. M. Jones—Dated Dec. 15, 1938

FOLDER

SIMPLEX VALVE & METER Co.—
1935

B I F Letter from Chafee to Roth—
Dated April 20, 1935

“ Letter from P. N. Engel to Roth
—Dated April 5, 1935

“ Letter from Chafee to Roth—
Dated March 26, 1935

“ Penciled note to Chafee from
C. G. R.—Dated March 8, 1935—
2 sheets

“ Letter from Roth to Chafee—
Dated February 12, 1935

“ Penned Notes on Simplex Draft
of Proposed license from Inter-
national—2 sheets

B I F Notes on Borden Patent by Ed.
S. Smith, Jr.—Feb. 12, 1935

Memo relative to proposed Inter-
national License—2 sheets

(25) (Continued) FOLDER

SIMPLEX VALVE & METER Co.—
1935

B I F Letter from Roth to Chafee—
Dated Feb. 5, 1935

Letter from Chafee to Simplex
Att. Roth—Dated Feb. 4, 1935

Penciled notes on conference be-
tween Roth, Smith and Chafee—
1/22/35—2 sheets

Letter from Roth to Chafee—
Dated Jan. 17, 1935

Letter from P. N. Engel of Inter-
national Filter to Roth—1/12/35

Letter from C. G. Richardson
to Smith of Simplex—Dated
12/15/34

Letter from Roth to Chafee—
Dated Jan. 14, 1935

Memorandum regarding propos-
ed license agreement between
Simplex and B I F by General
Zeolite Co.—Dated 1/7/35—By
W. H. Roth

Memo Relative to Proposed In-
ternational License

Letter from Richardson to Smith
of Simplex—Dated July 25, 1935

Letter from Richardson to Smith
—Dated July 17, 1935

Letter from Smith to Richardson
—Dated July 8, 1935—3 sheets

Letter from Smith to Richard-
son—Dated June 5, 1935

Letter from Richardson to Smith
—Dated May 25, 1935

Letter from Smith to Richardson
—Dated May 21, 1935—2 sheets

Letter from Richardson to Smith
—Dated May 17, 1935

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(Continued) FOLDER

SIMPLEX VALVE & METER CO.—
1935

- B I F Letter from Richardson to Smith
—Dated May 17, 1935
- “ Letter from Richardson to Smith
—Dated May 15, 1935
- “ Letter from Richardson to Alan
Wood—Dated April 20, 1935
- “ Letter from Richardson to Smith
—Dated April 8, 1935—2 sheets
- “ Letter from Smith to Richardson
—Dated April 5, 1935—2 sheets
- “ Letter from Richardson to Smith
—Dated April 5, 1935
- “ Letter from Smith to Richardson
—Dated April 3, 1935
- “ Letter from Richardson to Smith
—Dated April 1, 1935
- “ Letter from Richardson to Roth
—Dated Feb. 7, 1935

FOLDER

SIMPLEX—1936-1946—E R L.

- B I F Letter from A. E. Watjen to
Simplex Att. Jones—Dated May
21, 1941
- “ Letter from Roth to B I F—
Dated April 24, 1941
- “ Letter from Harveson of Sim-
plex to Greenough of B I F—
1/17/41
- “ Letter from Roth to Chafee—
Dated Nov. 27, 1940
- “ Letter from E. R. Loud to Roth—
Dated July 11, 1946
- “ Memo from E. R. Loud to Chafee
and Richardson—Dated 1944
- “ Memo from E. R. Loud to Chafee
—Dated May 27, 1944—2 sheets

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(Continued) FOLDER

SIMPLEX—1936-1946—E R L.

- B I F Letter from Chafee to Borden of
Simplex—Dated March 9, 1942
- “ Memo from E. R. Loud to Chafee
—Dated March 3, 1942—2 sheets

B I F Letter from Borden of Simplex
to Chafee—Dated Feb. 27, 1942

.. Letter from Chafee to Roth—
Dated Feb. 19, 1942

.. Letter to Simplex—Att. Mr. Roth
Unsigned—Dated Feb. 16, 1942

.. Memo from Richardson to E. R.
Loud—Dated Feb. 10, 1942—2
sheets

.. Memo from Richardson to Chafee
—Dated Feb. 2, 1942—2 sheets

.. Letter from Roth to Chafee—
Dated Jan. 28, 1942

.. Letter from Chafee to Roth—
Dated Jan. 2, 1942

.. Memo from Chafee to Richard-
son—Nov. 28, 1941

.. Memo from E. R. Loud to Rich-
ardson—Dated July 12, 1941

.. Memo from Richardson to Chafee
—Dated Dec. 24, 1940

.. Memo from E. R. Loud—Dated
Aug. 12, 1940

.. Memo from E. R. Loud to Rich-
ardson—Dated May 24, 1940

.. Memo from C. G. Richardson to
Chafee—Dated Aug. 26, 1939

.. Letter from Richardson to Sim-
plex—Dated Dec. 14, 1937

.. Letter from Chafee to Roth—
Dated Dec. 14, 1937

(28) (Continued) FOLDER

SIMPLEX—1936-1946—E-R L

B I F Letter from Chafee to Roth—
Dated Nov. 22, 1937

.. Letter from Richardson to Sim-
plex—Att. Borden—Dated Oct.
26, 1936

FOLDER

WALLACE & TIERNAN

B I F Letter from D. J. Purdie to
Richardson—Dated Oct. 31, 1938

.. Letter from Richardson to Pur-
die—Dated Oct. 29, 1938

FOLDER

SIMPLEX

B I F. Letter from Richardson to E. M. Jones—Dated July 6, 1937
 Letter from Richardson to Simplex—Att. Bordet and Jones—6/2/37
 Letter from Richardson to Simplex—Dated December 14, 1937

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1. Agreements between BIF and Omega, August 2, 1940.
2. Three agreements between E. E. Harper, Omega Co. and BIF together with four sheets of misc. papers. 5/25/44, 5/25/44 and 5/25/44.
3. Agreement between BIF and Simplex Valve & Meter Co., Greenfield Patents, 1/10/40, Expires 2/28/45.
4. Agreements between BIF and Foxboro Co., 12/31/36 and 12/31/36.
5. Agreement between BIF and Foxboro Co., 9/30/38, Expires 10/2/45.
6. Smart agreement, 9/27/34, 5/2/38 supplement.
7. Agreement between BIF and K. Smoot and Smoot Engr. Corp., 9/27/34 and 5/2/38.
8. Agreements between BIF and Infileo, 10/26/45 and 10/26/45.
9. Agreements between BIF and Leeds & Northrup, 2/16/42 and 2/16/42.
10. Agreement between BIF and Hydro-Electric Power Com. of Ontario, 7/6/45.
11. Agreement between BIF and The Brown Instrument Co., 3/11/40.
12. Agreements between BIF and The Bristol Co., 8/29/34, 8/29/34, 12/27/34, 2/3/35, 9/14/43 and 6/15/44.
13. Agreements between BIF and Bailey Meter Co., 11/23/37 and 12/17/40. Bulletins by Bailey—Re Synco-meter, by BIF—Re Aeronometer Chronoflo.
14. Agreements between BIF and W & T Products, Inc. 4/21/38.
15. Letter—H. S. Chafee to Maxwell Barus, 9/4/35.
16. Letter—H. S. Chafee to Maxwell Barus, 11/22/35.
17. Letter—H. S. Chafee to Maxwell Barus, 9/17/37.
18. Letter—Maxwell Barus to Henry S. Chafee, 9/20/37.

19. Letter—Maxwell Barus to Henry S. Chafee, 9/28/37.
20. Letter—C. G. Richardson to H. S. Hutton, undated.
21. Letter—H. S. Chafee to Maxwell Barus, 11/29/37.
22. Letter—Maxwell Barus to Henry S. Chafee, 12/2/37.
23. Letter—H. S. Chafee to Maxwell Barus, 12/17/37.
24. Letter—H. S. Chafee to Maxwell Barus, 12/27/37.
25. Letter—H. S. Chafee to Maxwell Barus, 1/13/38.
- (30)
26. Letter—Maxwell Barus to Henry S. Chafee, 1/14/38.
27. Letter—H. S. Chafee to Maxwell Barus, 1/22/38.
28. Proposed agreement between BIF and W & T Co., Inc., undated (4 pages).
29. Letter—H. S. Chafee to Maxwell Barus, 1/24/38.
30. Proposed agreement between BIF and W & T Co., Inc., undated (2 pages).
31. Letter—H. S. Chafee to Maxwell Barus, 3/22/38.
32. Letter—H. S. Chafee to Maxwell Barus, 4/6/38.
33. Questions upon W & T Draft of April 14, 1938, dated 4/18/38.
34. Letter—Bertha M. Zimbood to Henry S. Chafee, 4/15/38.
35. Letter—H. S. Chafee to Maxwell Barus, 4/20/38.
36. Letter—Maxwell Barus to Henry S. Chafee, 4/30/38.
37. Letter—H. S. Chafee to William Orchard, 4/28/38.
38. Letter—BIF to William Orchard, undated (proposed letter).
39. Letter—H. S. Chafee to William Orchard, 4/28/38.
40. Letter—H. S. Chafee to Maxwell Barus, 2/17/39.
41. Letter—Maxwell Barus to Henry S. Chafee, 2/20/39.
42. Letter—H. S. Chafee to Maxwell Barus, 3/9/39.
43. Letter—Maxwell Barus to Henry S. Chafee, 3/15/39.
44. Letter—Alfred R. Fuchs to L. E. Harper, 2/16/44 (Report on Wallace & Tiernan Patents—23 pages).
45. Letter—H. S. Chafee to Maxwell Barus, 2/9/35.
46. Letter—Maxwell Barus to Henry S. Chafee, 2/15/35.
47. Telegram—Maxwell Barus to Henry S. Chafee, 3/19 (No year).
48. Telegram—H. S. Chafee to Maxwell Barus, 3/19/42.
49. Envelope-containing documents re License with Simplex Valve & Meter Co. Vent. Cleaners, 3/10/37, 2/6/37.

(31)

The following minutes from BIF Board of Directors Meetings:

Meeting. Pages

Book I

5-13-33	124-125
2-7-34	125-127
7-13-34	127-128
2-6-35	128-129
3-27-35	130-131
6-19-35	131-134
11-1-35	134-137
12-6-35	137-138
2-12-36	138-140
5-25-36	140-141
6-24-36	141-143

Book II

9-1-36	1-4
11-10-36	4-5
2-5-37	5-7
6-25-37	8
2-2-38	9-10
4-27-38	10-12
7-22-38	12-16
10-28-38	17-22
2-1-39	23-26
4-21-39	27-29
6-9-39	30-33
10-27-39	34-36
2-7-40	37-39
6-14-40	40-41
8-13-40	42-43
10-25-40	44-45
11-18-40	46
11-22-40	47-49
2-5-41	50-51
4-4-41	52-57
4-30-41	58-59
6-20-41	60-62
8-29-41 and)	63-65
9-26-41	
11-7-41	66-69
6-30-44	104-106
7-41-44	107-108
9-29-44	109-111
11-10-44	112-114
2-7-45	115-117

Stockholders

<i>Meeting</i>	<i>Pages</i>
11-15-01	64-68
2-5-02	67-68
6-30-20	96-97
3-23-21	97-99
2-5-37	133-136
2-2-38	137-139
2-7-45	165-171

(32) FROM BUILDERS MANAGEMENT ASSOCIATES

The following minutes from Board of Directors meetings:

Meeting Date

Jan. 13, 1940 (Report to BMA)

July 8, 1939 (13 pages) (Report to BMA)

May 20, 1939

March 4, 1939

January 27, 1939 (Report to BMA)

Dec. 17, 1938

Nov. 26, 1938

Nov. 7, 1938

Oct. 29, 1938

then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein United States of America is Plaintiff and Wallace & Tiernan Company, Inc., *et al.* is Defendant.

WITNESS, the Honorable JOHN P. HARTIGAN District Judge of the United States, this 12th day of May A. D. 1948.

(L S)

(s) NEALE D. MURPHY,
Clerk.

RETURN ON SERVICE

*United States of America,)
District of Rhode Island.)*

Received this writ at Providence, Rhode Island on May 14, 1948 and on May 14, 1948, at Providence, Rhode Island, I served it on the within-named Builders Iron Foundry, by reading and leaving a true copy thereof in the hands and possession of Henry S. Chafee, President and Treasurer of Builders Iron Foundry, 9 Coddling Street, Providence, R. I. and paying the lawful witness fee of \$2.00.

MARSHAL'S FEES

Travel \$.16

Service50

\$.66

CHARLES M. ELDRIDGE,
U. S. Marshal:

By WALTER GORDON, /s/
Deputy.

/1006

In the United States District Court

Motion to Quash Subpoenas Duces Tecum—Filed May 18, 1948.

Now comes the defendant, Builders Iron Foundry, and represents to this Honorable Court as follows:

(1) On May 12, 1948, subpoenas *duces tecum* were issued at the instance of the United States of America directed to Builders Iron Foundry and Proportioneers, Inc. commanding said Builders Iron Foundry and Proportioneers, Inc. to appear before this court on May 26, 1948 and then to produce the documents produced before the additional grand jury for the November, 1945 term of this court and listed, designated and described in exhibits attached thereto, said exhibits being photostatic copies of the Government's office records of such documents. Said subpoenas were served on May 14, 1948 on said Builders Iron Foundry and said Proportioneers, Inc.

(2) Said additional grand jury was an illegally constituted body as already determined by this court in that certain criminal proceedings designated as Indictment 6055, and the United States of America on or about August 5, 1946 wrongfully used the process of this court to compel the production before said body of the same documents which it now seeks to have produced by said subpoenas *duces tecum*. Said action constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. The descriptions of said documents attached to said subpoenas *duces*
507 *tecum* were prepared by the United States of America by the use of said documents at a time when it was illegally in possession of them.

(3) Inasmuch as the use of said documents for any purpose either as a means of drafting the subpoenas or as evidence before the court is illegal, said subpoenas *duces tecum* are unreasonable, oppressive and illegal.

Wherefore the defendant, Builders Iron Foundry, moves that said subpoenas *duces tecum* be quashed.

CHAUNCEY E. WHEELER, (s)

S. EVERETT WILKINS, JR., (s)

Attorneys for Defendant,

Builders Iron Foundry.

May 18, 1948.

In the United States District Court

308 *Affidavit of S. Everett Wilkins, Jr.—Filed May 24, 1948.*

I, S. EVERETT WILKINS, JR., depose and say that I am an attorney at law admitted to practice in the State of Rhode Island and in this Court, and am one of the counsel for defendant, Builders Iron Foundry, in the above entitled cause.

On May 12, 1948, subpoenas *duces tecum* were issued at the instance of the United States of America directed to Builders Iron Foundry and Proportioneers, Inc. commanding said Builders Iron Foundry and Proportioneers, Inc. to appear before this court on May 26, 1948 and then to produce the documents produced before the additional grand jury for the November, 1945 term of this court and, listed, designated and described in exhibits attached thereto, said exhibits being photostatic copies of the Government's office records of such documents. Said subpoenas were served on May 14, 1948 on said Builders Iron Foundry and said Proportioneers, Inc.

Said additional grand jury was an illegally constituted body as already determined by this court in that certain criminal proceeding designated as Indictment 6055; and the United States of America on or about August 5, 1946 wrongfully used the process of this court to compel the production before said body of the same documents which

509 it now seeks to have produced by said subpoenas *duces tecum*. Said action constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. The descriptions of said documents attached to said subpoenas *duces tecum* were prepared by the United States of America by the use of said documents at a time when it was illegally in possession of them.

S. EVERETT WILKINS, JR. (s)

Subscribed and sworn to before me at Providence, this 17th day of May, 1948.

HELENE B. CASEY, /s/
Notary Public.

510 In United States District Court

Motion to Quash Subpoena Duces Tecum—Filed May 18, 1948.

Now comes Proportioneers, Inc., a Rhode Island Corporation, and represents to this Honorable Court as follows:

(1) On May 12, 1948, a subpoena *duces tecum* was issued at the instance of the United States of America directed to said Proportioneers, Inc., commanding said Proportioneers, Inc. to appear before this court on May 26, 1948 and then to produce the documents produced before the additional grand jury for the November, 1945 term of this court and listed, designated and described in an exhibit attached thereto, said exhibit being a photostatic copy of the Government's office records of such documents. Said subpoena was served on May 14, 1948 on said Proportioneers, Inc.

(2) Said additional grand jury was an illegally constituted body as already determined by this court in that certain criminal proceeding designated as Indictment 6055, and the United States of America on or about August 5, 1946 wrongfully used the process of this court to compel the production before said body of the same documents which it now seeks to have produced by said subpoena *duces tecum*. Said action constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. The descriptions of said documents attached to said subpoena *duces tecum* were prepared by the United States of America by the use of said documents at a time when it was illegally in possession of them.

(3) Inasmuch as the use of said documents for any purpose either as a means of drafting the subpoena or as evidence before the court is illegal, said subpoena *duces tecum* is unreasonable, oppressive and illegal.

Wherefore the said Proportioneers, Inc. moves that said subpoena *duces tecum* be quashed.

CHAUNCEY E. WHEELER, (s)

S. EVERETT WILKINS, JR. (s)

Attorneys for Proportioneers, Inc.

May 18, 1948

Motion to Extend, Without Prejudice, Date for Compliance with Subpoenas Duces Tecum, or, in the Alternative, to Quash Such Subpoenas—Filed May 19, 1948.

Now comes the defendants, Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agenc Corporation and Industrial Appliance Corporation, and represent to and move this Honorable Court as follows:

1. On May 14, 1948, purported subpoenas *duces tecum* entitled in this action, and bearing as witness the name of the Honorable John P. Hartigan, the Judge of this Court, and directed to these movants, respectively, were served on the movants in New Jersey and commanded as follows:

"YOU ARE HEREBY COMMANDED to appear in the DISTRICT COURT OF THE UNITED STATES for the District of Rhode Island, at the Courthouse, in the City of Providence, in said District, on the 26th day of May A. D. 1948, at 10 o'clock A. M. of said day, and also that you bring with you and produce at the time and place aforesaid the documents listed, designated, and described in Exhibit A, attached hereto, which were produced by you before the additional grand jury for the November 1945 term of this court and which bear the numbers listed in said Exhibit A placed upon said documents on your behalf prior to their production before said grand jury: then and there to testify on behalf of the Plaintiff in a suit pending in said Court wherein United States of America is plaintiff and Wallace & Tiernan Company, Inc., *et al.* is defendant."

2. The bulk of the documents called for in these purported subpoenas are the documents which the Department of Justice thought its Antitrust Division heretofore made the subject of a motion in this action filed April 14, 1948, and entitled "Motion for Production of Documents under Rule 34." That motion was argued before this Court on May 3, 1948; and in opposition thereto these defendants submitted and filed on April 30, 1948, affidavits by William H. Edwards and Frederick G. Merckel, respectively, verified April 29, 1948. The movants now refer to those affidavits and incorporate and submit them in support of their present motion.

3. No decision on the Motion by the Department of Justice for Production of Documents under Rule 34 has yet been rendered by this Court.

4. No trial of this action can be held on May 26, 1948, or for a considerable time thereafter.

WHEREFORE, in consequence of the foregoing and because of the facts and reasons stated in the affidavits of Mr. Edwards and Mr. Merckel, the defendants aforesaid now move that this Court (without prejudice to these defendants and their right *inter alia* to ask that the purported subpoenas be vacated and quashed) extend the date for compliance with such purported subpoenas until twenty (20) days after the entry of an order on the Motion of the Department of Justice for the Production of Documents under Rule 34; or, in the alternative, that this Court quash and vacate the purported subpoenas. This motion is to be deemed made without prejudice to any legal and constitutional rights of the defendants aforesaid, or of any of them, as regards the purported subpoenas or any purported obligation to comply therewith in whole or in part.

By their attorneys,

EDWARDS & ANGELL,
HOGAN AND HOGAN.

May 19, 1948

Service of the above motion
is hereby acknowledged.

GEORGE F. TROY, /s/

United States Attorney.

514

In United States District Court.

*Motion to Extend, Without Prejudice, Date for Compliance
with Subpoena Duces Tecum, or, in the Alternative,
to Quash Such Subpoena*

Filed May 24, 1948

Now comes Fairbanks, Morse & Co. (which is not and never has been a party to this proceeding), appearing specially for the purpose only of moving to quash, set aside and vacate a subpoena *duces tecum* which has been served upon it to produce certain documents, and now represents to and moves this Honorable Court as follows:

1. On May 20, 1948, a purported subpoena *duces tecum* entitled in this action and directed to this movant was served upon the movant in Illinois, commanding said Fairbanks, Morse & Co. to appear in the District Court of the United States for the District of Rhode Island on the 26th day of May, 1948, and to produce at the time and place afore-

said certain documents designated and described in Exhibit A attached thereto, and then and there to testify in behalf of the plaintiff in the above entitled cause.

2. The documents called for in said purported subpoena are documents which were produced before the additional grand jury for the November, 1945 term of this Court, pursuant to a purported subpoena issued by said grand jury.

515 3. There is pending for decision in the above entitled cause a motion by the Department of Justice through its Antitrust Division, filed April 14, 1948, entitled "Motion for Production of Documents under Rule 34," on which motion no decision has yet been rendered, and no trial of this action will be had on May 26, 1948, or for a considerable time thereafter.

4. Said additional grand jury for the November, 1945 term of this Court was an illegally constituted body; as has already been determined by this Court in that certain criminal proceeding designated as Indictment 6055, and the United States of America on or about August 5, 1946, wrongfully used the process of this Court to compel the production before said body of the same documents which it now seeks to have produced by said subpoena *duces tecum*. Said action constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States. The descriptions of said documents attached to said subpoena *duces tecum* were prepared by the United States of America by the use of said documents at a time when it was illegally in possession of them.

5. The use of said documents for any purpose, either as a means of drafting the subpoena or as evidence before the Court, is illegal and said subpoena *duces tecum* is unreasonable, oppressive and illegal.

WHEREFORE and in consequence of the foregoing, said Fairbanks, Morse & Co., appearing specially as above stated, (without prejudice to its right *inter alia* to ask that the purported subpoena be set aside, vacated and quashed) now moves that this Court extend the time for compliance with said purported subpoena until twenty (20) days

516 after the entry of an order on said Motion for the Production of Documents under Rule 34; or, in the alternative, that this Court quash, set aside and vacate the purported subpoena. This motion is to be deemed made without prejudice to any legal and constitutional rights of the defendant aforesaid as regards the purported subpoena

or any purported obligation to comply therewith in whole or in part.

By its attorneys,

HAROLD E. STAPLES,
THE INGHEAST, COLLINS & TANNER.

In the United States District Court

517 *Motion to Vacate and Quash Civil Subpoena*
Duces Tecum—Filed May 24, 1948

Now COMES the defendant Hellige, Inc., by Paul A. E. Hellige its president, and respectfully shows to this Court and alleges: the said Hellige, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has a principal place of business at Long Island City, County of Queens, City and State of New York.

On May 14th, 1948, there was served upon Hellige, Inc. a subpoena *duces tecum* in the above entitled action purporting to have been issued under the seal of this Court on May 12th, 1948, requiring said Hellige, Inc. to produce before this Court on the 26th day of May, 1948, at 10:00 o'clock of said day, twenty-seven (27) original documents and twenty-five (25) copies of other documents, copy of which is hereto annexed and marked Exhibit A.

The documents required to be produced pursuant to the said purported subpoena *duces tecum* had heretofore been made the subject of a subpoena *duces tecum* served upon Hellige, Inc. during the month of May, 1946, by a body which purported to have been a duly constituted and impaneled Special Grand Jury of this Court and, pursuant to the said subpoena *duces tecum*, the said Hellige, Inc. did produce before the Special Grand Jury all of said documents as it had in its possession.

Subsequently, and on or about November 18th, 1946, the aforesaid purported Special Grand Jury returned an alleged indictment against the said Hellige, Inc. among others, and in four counts in the said purported indictment the said Hellige, Inc. was charged with violations of Sections 1 and 2 of the so-called Sherman Act. (15 U. S. C., Sec. 1 and 2.)

By notice of motion dated January 24th, 1947, said Hellige, Inc. moved this Court for an order dismissing the aforesaid indictment on the ground that the Special Grand Jury which returned the indictment was illegally selected,

drawn, summoned, impaneled and sworn. Said motion came on to be heard before this Court on the 19th day of March, 1947, and the same was in all respects granted and an order was duly made and entered the 7th day of April, 1947, dismissing the said indictment against Hellige, Inc. and others.

On May 1st, 1947, the United States of America by its Attorney General and certain of his assistants filed an Information with this Court against Hellige, Inc. Paul A. E. Hellige, its president, and other persons and corporations charging in almost the same language as contained in the aforesaid invalid indictment, violations of the so-called Sherman Act, Sections 1 and 2. (15 U. S. C. Sec. 1 and 2.)

Thereafter, said Hellige, Inc. brought on a motion before this Court praying that each and every one of the documents aforesaid, and all photostatic copies or other copies thereof, and all evidence contained in the said documents or copies thereof, and information included therein be excluded upon the trial of the said Information and that such evidence be suppressed. And praying further that all such documents, copies and evidence derived from such documents be returned to said Hellige, Inc.

Upon the opinion of the Court dated February 6th, 1948, an order was thereupon docketed granting said motion and companion motions brought by Wallace and Tiernan Company, Inc. *et al.*

Thereafter the Attorney General returned some original documents and photostatic copies of other documents to Hellige, Inc.

Despite the fact that Hellige, Inc. is not a party to the civil action, your petitioner believes that the United States of America by its Attorney General and his assistants intend to or may use the documents to be produced pursuant to the said subpoena *duces tecum* in the prosecution of the aforesaid Information.

The voluntary production or surrender of the documents sought to be produced under the subpoena *duces tecum* served upon Hellige, Inc. may well be construed as a waiver of the provisions and directions of the order suppressing the original documents, copies and evidence secured therefrom which had been heretofore produced under the illegal subpoena *duces tecum* of the purported Special Grand Jury, thereby subjecting said Hellige, Inc. to penalty and forfeiture.

WHEREFORE, your petitioner respectfully prays that the subpoena *duces tecum* dated May 12th, 1948, issued out of and under the seal of this Court in the above
 520 entitled cause to be vacated and quashed, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, May 21st, 1948.

HELLIGE, INC., *Petitioner*.

By: PAUL A. E. HELDIGE, (s)
President.

Due and timely service acknowledged.

GRANT W. KELLEHER, (s) L. S.

521 Duly sworn to by Paul A. E. Helligge.
 Jurat omitted in printing. (All in italics).

522 *Exhibit "A" to Motion.*

1. The originals of the following documents:
 1. Letter, from Peet to Helligge, dated July 28, 1931.
 2. Letter, from Peet to Helligge, dated January 27, 1938.
 3. Letter, from Peet to Helligge, dated February 1, 1938.
 4. Letter, from Wallace & Tiernan Products, Inc. to Helligge, Inc., dated June 22, 1938.
 5. Letter, from Griffin to Helligge, dated February 24, 1939.
 6. Letter, from A. E. Griffin to Helligge, Inc., dated April 12, 1939.
 7. Letter, from Everson Mfg. Co. to Helligge, Inc., dated April 25, 1939.
 8. Letter, from Wallace & Tiernan Products, Inc. to Helligge, Inc., dated November 28, 1939.
 9. Letter, from Peet to Helligge, dated December 14, 1939.
 10. Purchase Order #26539, from Everson Mfg. Co. to Helligge, Inc., dated February 12, 1940.
 11. Letter, from G. D. Peet to Dr. Paul E. Helligge, dated June 19, 1940.
 12. Letter, from Peet to Helligge, dated June 24, 1940.
 13. Letter, from McDonald to Helligge, dated June 24, 1940.
 14. Letter, from Gerald D. Peet to Dr. P. A. E. Helligge, dated June 27, 1940.
 15. Letter, from Gerald D. Peet to Dr. P. A. E. Helligge, dated July 3, 1940.
 16. Letter, from Hutton to Helligge, dated September 30, 1940.
 17. Letter, from Peet to Helligge, dated October 28, 1940.

18. Letter, from Hutton to Hellige, dated October 28, 1940.
19. Letter, from Peet to Hellige, dated October 28, 1940.
20. Letter, from Hutton to Hellige, dated December 5, 1940, and attached letter of agreement, from Gerald D. Peet to Hellige, Inc., dated November 29, 1940.
21. Letter, from Peet to Hellige, dated December 5, 1940.
22. Letter, from McDonald to Hellige, dated December 16, 1940.
23. Letter, from Peet to Hellige, dated April 29, 1941, and copy attached thereto of letter from Hutton to Howe & French, Inc., dated April 29, 1941.
24. Letter, from Peet to Hellige, dated April 29, 1941.
25. Memorandum, entitled "Wallace & Tiernan commissions," dated 7-9-41.
26. Letter, from Peet to Hellige, dated July 31, 1941.
27. Document entitled "Hellige, Inc., Comparators for Chlorine Determinations."

II. Carbon copies of the following documents:

1. Letter, from Hellige to Wallace & Tiernan, dated June 14, 1934.
2. Memorandum of conference, by Peet, dated February 1, 1938.
3. Letter, from Hellige to Tiernan, dated August 29, 1938.
4. Letter, from L. W. Hoshour to Wallace & Tiernan Products, Inc., dated January 19, 1939.
5. Letter, from L. W. Hoshour to Wallace & Tiernan Products, Inc., dated April 3, 1939.
6. Letter, from Hellige, Inc. to Everson Mfg. Co., dated April 29, 1939.
7. Letter, from Hellige, Inc. to Everson Mfg. Co., dated February 15, 1940, and enclosed bulletin #605.
8. Letter, from Dr. P. A. E. Hellige to G. D. Peet, dated June 14, 1940.
9. Letter, from Hellige, Inc. to Wallace & Tiernan Products, Inc., dated June 18, 1940.
10. Letter, from Hellige to Peet, dated June 26, 1940.
11. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 27, 1940.
12. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 27, 1940, together with a two-page memorandum attached to the letter, entitled "Builders Iron Foundry orders cancelled by Hellige, Inc." and dated 6-27-40.
13. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 27, 1940.

14. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated June 29, 1940, and enclosure described as "Enc. #602, Proof Sheet."
15. Letter, from Dr. P. A. E. Hellige to Gerald D. Peet, dated July 5, 1940.
16. Letter, from Hoshour to Wallace & Tiernan, dated September 23, 1940.
- 524 17. Letter, from Hellige to Hutton, dated October 3, 1940.
18. Letter, from Hellige to Hutton, dated November 4, 1940.
19. Letter, from L. W. Hoshour to Wallace & Tiernan Products, Inc., dated December 11, 1940.
20. Letter, from Hoshour to Wallace & Tiernan Products, Inc., dated January 9, 1941.
21. Letter, from Hoshour to Hutton, dated April 8, 1941.
22. Letter, from Hellige to Peet, dated April 15, 1941.
23. Letter from Hellige to Peet, dated April 24, 1941.
24. Letter from Hellige to Peet, dated April 30, 1941.
25. Letter, from Hellige to Peet, dated August 26, 1941.

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In United States District Court
Before His Honor, Judge Hartigan
Monday, May 24, 1948

Heating on Motions To Quash Subpoena Duces Tecum

APPEARANCES

For the Government:

Grant W. Kelleher, Esq., Special Assistant to the Attorney General. Alfred Karsted, Esq., Special Attorney.

For the Defendants:

Wallace & Tiernan. Charles H. Tuttle, Esq., Loren N. Wood, Esq.; Edwards & Angell, William H. Edwards, Gerald W. Harrington, and John V. Kean, Esqs., appearing.
Novadel-Agena Corporation, Industrial Appliance Corporation. Hogan & Hogan; Laurence J. Hogan, Esq., appearing.

Builders Iron Foundry, Proportioneers, Inc. Hinekey, Allen, Tillinghast & Wheeler; Chauncey Wheeler, Esq., S. Everett Wilkins, Jr., Esq., appearing.

Fairbanks, Morse & Co. Tillinghast, Collins & Tanner; Harold E. Staples, Esq., appearing.

Hellige, Inc. James F. Dulligan, Esq., appearing.

Monday, May 24, 1948

11:10 A. M.

The COURT. You may proceed, gentlemen.

MR. STAPLES. If your Honor please, I represent Fairbanks Morse & Company which is not a party to this civil suit but has been served with a subpoena *duces tecum*. It was served only on Thursday of last week so that I have not had very much time to look into this matter but I talked to Mr. Kelleher and—I understand it is agreeable to him—I said I would file a motion this morning similar to others which have been filed. I have given him a copy of it and would like to file it at this time, and the motion can be heard by your Honor and decided at the same time as the other motions.

The COURT. What is the defendant's name—Wood?

MR. STAPLES. No, this is just Fairbanks, Morse & Company.

MR. EDWARDS. May it please the Court, this matter, Civil Action No. 705, comes before the Court this morning on these various motions. We have a motion in behalf of Wallace & Tiernan Co., Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, and Industrial Appliance Corporation, to extend the date for compliance with certain subpoenas that have recently been served upon us until twenty days after the entry of an order on the motion under Rule 34 which was heard by your Honor on the 3rd day of May; or, in the alternative, that the Court quash those subpoenas.

MR. STAPLES has his motion that he has filed. MR. 528 Wheeler and Mr. Wilkins have motions to quash in behalf of the defendant, Builders Iron Foundry, and also in behalf of a corporation which is not a party, Proportioneers, Inc. And without going into detail in the matters arising on these motions to quash, we should think that it would save the time of the Court and of everyone if at this point the Government stated its position on the matter, particularly in view of your Honor's statement to us in chambers this morning about the prospective decision on the three motions of the Government which were heard on the 3rd of May.

The COURT. Pursuant to what you have just stated and as a result of conference in chambers between attorneys for the Government and the Wallace & Tiernan companies, and for the purpose of the record now so that your argu-

ments may be guided accordingly, the Court denies the motion to vacate order on motion for return of photostatic copies of documents, the motion for production of documents under Rule 34; which said motions were filed April 14, 1948, and the motion for the production of photostatic copies of documents surrendered by the plaintiff and filed on April 22, 1948. The Court, within the course of a few days, will file a memorandum to that effect, gentlemen.

Mr. KELLEHER. May it please the Court—

The COURT. Mr. Kelleher?

Mr. KELLEHER. It was my intention this morning before your Honor announced the ruling on the pending motions to advise the Court that in the view of the Government the Present motions to quash raise substantially the same issues as those disposed of by your Honor's decision on the motions for production of the photostats and for inspection under Rule 34 argued May 3, 1948. For that reason it seems to me, your Honor, that there is no reason for me to indulge in any further argument. I would like to submit these present motions on the basis of the arguments made on May 3rd and the memoranda of points and authorities submitted at that time.

The COURT. As I understand it, Mr. Kelleher, all of these subpoenas we are considering here this morning call for the production of photostats that have been the subject of previous hearings?

Mr. KELLEHER. Call for the production of the original documents that were the subject of photostats which were involved in the Grand Jury investigation.

The COURT. The original—

Mr. KELLEHER. Yes, sir, the documents we are calling for by virtue of the subpoenas issued now and which are the subject of motions to quash are the documents which were produced before the Grand Jury which your Honor later found to be an illegally constituted Grand Jury, and which documents your Honor later ordered us to return to the defendants.

The COURT. Where do the photostats come into the picture on these—

530 Mr. KELLEHER. On the pending motions?

The COURT. Yes, on the motions pending today.

Mr. KELLEHER. They are not involved. These subpoenas are directed—

The COURT. Just to the originals.

Mr. KELLEHER. —to the originals.

The COURT. Just to clear it up a little more, the Government did take photostats of some of those originals?

Mr. KELLEHER. These documents, which we call for, as I understand it, are the documents which we photostated.

The COURT. That is what I wanted to make clear.

Mr. KELLEHER. Yes, sir, that is correct.

The COURT. The photostatic documents are involved even though you refer to them as the originals of those.

Mr. KELLEHER. Yes, sir, that is correct. In other words, as far as the Wallace & Tiernan companies are concerned, the same documents are involved on the pending motions being heard this morning as were involved in the motion for production under Rule 34. As far as the other companies are concerned, the documents involved are those which we photostated and the photostatic copies were returned pursuant to your Honor's later orders.

Mr. EDWARDS. For our part, we stand on the argument made on the 3rd of May because we assumed that the same problem was involved here; and now that the Government has so frankly stated that the same issue was involved and it wishes to stand on the argument of the 3rd of May.
531 I should hardly think it necessary for us, on behalf of Wallace & Tiernan, to say anything further. I am not speaking now for Mr. Wilkins or Mr. Staples.

Mr. WILKINS. If the Court please, so far as the merits of the motions of Builders Iron Foundry and Proportioneers, Inc. are concerned, in view of the Government's statement, I see no reason to argue them at length and we will submit the motions.

I do wish to cite a few cases on a purely procedural matter in view of the fact that one of these motions is filed by Proportioneers, Inc., which is not a party to the case but appears as a person upon whom the subpoena *duces tecum* has been served, asking relief. I cite the case of *Allen Bradley Co. v. Local Union No. 3* in 29 Fed. Sup. 759. That is a case in the Southern District of New York decided in 1939 in which the Court approved of the remedy of moving to quash a subpoena *duces tecum* by a person who was not a party to the case; and included in the Builders Iron Foundry motion is a prayer that the subpoena against Proportioneers, Inc. be quashed as well as the subpoena served against Builders Iron Foundry. As authority for that procedure the case of *Miller v. Adelson* in 4 Fed. Rules Decisions 176, which is out of the Western District of Pennsylvania in 1944, is in square authority for the proposition

that a party may move to quash a subpoena *duces tecum* served on a disinterested witness or a person not a party to the case.

532 I merely cite those in case any question comes up as to the propriety of the procedure which Builders Iron Foundry and Proportioneers have followed.

Mr. STAPLES. I will submit for Fairbanks, Morse on what has been said by counsel.

Mr. KELLEHER. May it please your Honor, we make no point of the fact that neither Fairbanks, Morse nor Hellige, Inc. are not parties to the present suit.

The COURT. Very well. Well, then, gentlemen, it seems that there is nothing for the Court to do other than to be consistent with its previous rulings, and for the purpose of the record the motions to vacate, set aside and quash subpoenas *duces tecum* as filed are granted. You may submit and enter your orders on that, gentlemen.

Mr. EDWARDS. May it please the Court, I wonder if at this time with all counsel present, it might be a good idea—I think this was suggested when we were in chambers or suggested by implication—to discuss whatever might be discussed at the call of the calendar tomorrow as to this civil case. It has been noted for call on the calendar tomorrow and we don't precisely understand what the Government's position is.

The COURT. Gentlemen, in view of the fact that the Court hasn't any other assignment following this today, I should be glad, because there are so many attorneys involved here outside the state including the Government's attorneys and attorneys for the various defendants, to take any-

533 thing you wish now that you might take tomorrow.

In other words, if you wish to proceed at the moment by considering this case as called for assignment and that it is agreeable to the parties, I shall be glad to listen to you to save your time and also save the time of the Court. Do I make—

Mr. KELLEHER. Yes, sir, I understand.

The COURT. In other words, suppose this were Tuesday, May 25th, at the call of the calendar at the opening of the term. You may proceed along that line.

Mr. KELLEHER. Normally I suppose the procedure would be to state, "Ready." In this instance the Government is ready for the next step of the case.

The COURT. You call the case ready?

Mr. KELLEHER. Yes, sir. We would like a date set by your Honor at which the Government may make its statement.

which I have indicated we intend to make concerning our ability to go forward in the case, I am not prepared to make such a statement this morning but I would like to have a definite date set when I may make that statement, so that the record may be perfectly clear about the extent of it and the reasons for it.

Mr. TUTTLE. If the Court please—

The COURT. Mr. Tuttle?

Mr. TUTTLE. The defendant, if it were to be confronted with a trial in the usual sense of the term, would be obliged to state that it would require ample time to get ready for a full trial because we would have 534 many depositions which we would want to take over a considerable area and the trial itself would occupy undoubtedly many weeks as both sides agree. But as I understand it from what Mr. Kelleher says now and has said in the past, he is looking forward to a certain announcement which he proposes to make when the case is called for trial which will avoid a trial in the usual sense of the term in order that he may suggest dismissal and thereby take an appeal.

As he frankly stated—and I think perhaps it would be well to recall it now on the record because we are relying on this statement—we of the defense are relying on it in approaching this subject of a date when the case could be taken up for trial—Mr. Kelleher stated on April 20, 1948, in accordance with the official transcript of the argument of that day, Pages 10 and 11:

“Mr. KELLEHER. Just a day certain so that we can issue our subpoenas. At that time if the subpoenas *duces tecum* have been denied, if the motions for discovery have been denied, if your Honor refuses to permit us to use the photostats for preparation for trial, we are prepared to announce to the Court that the Government is unable to proceed further in the trial of the case; that the Government has no evidence of any substantial amount on the basis of which it can go ahead with the trial; and we will, therefore, suggest to your Honor that you enter judgment with prejudice against the Government and from that judgment we shall appeal directly to the Supreme Court of the United States.”

Now I understand from what Mr. Kelleher says that that statement made on April 20th represents his position, the official position of the Department of Justice; and

535 that, accordingly, so far as selecting a date for this procedure being carried forward, we of the defense can rely on it; and that, in consequence, we need not make any preparation in the usual sense.

Under those circumstances the question of a date does not concern us as deeply as it would if we were obliged to make preparation for a full trial and, therefore, perhaps it would be appropriate if Mr. Kelleher would lead off by suggesting a date when he can make a formal statement of this character and secure the dismissal since that is apparently what he seeks in order that he may have his mechanism for an appellate review; mechanism, of course, which we shall oppose when the time comes.

MR. KELLEHER. I wish to assure counsel and the Court that in view of the rulings of the Court announced today, the Government does not intend to offer evidence if a date is granted as we have requested.

I would, however, like to elaborate on that statement formally for the record at the appropriate time. Now I would like also to make one qualification of the statement which I made on April 20th in response to your Honor's question. I, of course, understood, and I think your Honor's question in asking me what we proposed to do in the future was not a commitment in any way by the Government but was an explanation of how we intended to proceed.

I said on Page 11 of the transcript of the hearing
536 on that date that

"* * * we will, therefore, suggest to your Honor that you enter judgment with prejudice against the Government and from that judgment we shall appeal directly to the Supreme Court of the United States."

Since making that statement we have been considering whether judgment with prejudice or without prejudice should be entered, and I do not intend to concede that the judgment to be entered should be with prejudice. That is a legal issue which we are prepared to present to your Honor at the appropriate time.

THE COURT. My questions propounded to you were merely to obtain an indication, without being actually a commitment in that sense. I don't know what you propose to do at the proper times.

MR. KELLEHER. My colleague, Mr. Karstedt, straightened me out shortly afterwards on that error.

THE COURT. Now, gentlemen, that being the case, I shall be glad to listen to counsel for a date that is convenient to you.

Mr. KELLEHER. May I suggest some day next week?

The COURT. Can you give me any assistance about how long you will take on this on both sides because, as you know, the trial calendar starts Wednesday and I don't know what the situation will definitely be, but if it wouldn't take too long, gentlemen,—say an hour, an hour and a half? Do you think that would be sufficient?

Mr. KELLEHER. I should think it would. I will
537 take only a few minutes to make this statement.

The COURT. You will have something prepared undoubtedly?

Mr. KELLEHER. Yes, your Honor.

Mr. TUTTLE. May I inquire of Mr. Kelleher whether or not for the formality of the situation he would want to impanel a jury or would you treat this just as an equity case without—

Mr. KELLEHER. No.

Mr. TUTTLE. Then there will be no delay over that.

Mr. KELLEHER. Oh, no, this is a non-jury case, as I understand it.

The COURT. Yes, it is on the non-jury calendar. You will proceed along that line then on the non-jury calendar. Will counsel for the defendants indicate about how long they think they would take under the circumstances, in view of what Mr. Kelleher has already stated in previous hearings and this morning?

Mr. TUTTLE. I feel, your Honor, under those circumstances we would scarcely be required to participate further than to lend our presence.

The COURT. If that is the case, gentlemen, what date do you suggest?

Mr. KELLEHER. I might say this: There may be a question raised at that time as to whether defendants should submit a motion for dismissal, and I simply point that out
538 because the issue will arise and counsel should be prepared on it.

The COURT. Well, gentlemen, in view of the circumstances of this whole matter, the Court will be glad to give you any date that he can that is agreeable to counsel. I have a calendar here, gentlemen, if you want to look at it.

Mr. KELLEHER. I am available any date next week. I would suggest Thursday but—Counsel suggest Wednesday which is also agreeable to the Government.

The COURT. That will be Wednesday, June 2nd.

Mr. KELLEHER. Wednesday, June 2nd is satisfactory to the Government.

The COURT. It doesn't make any difference to the Court, gentlemen. Can you gentlemen agree on the time?

Mr. KELLEHER. My preference is to get the thing started in the morning but ~~again~~ I can agree to the convenience of counsel.

Mr. EDWARDS. Will you give us a minute, your Honor?

The COURT. Yes.

(Counsel confer):

Mr. KELLEHER. Mr. Tuttle suggested we make it in the afternoon because that avoids traveling at night, and that is agreeable to the Government.

The COURT. June 2nd, 2:00 P. M., gentlemen. Is that satisfactory?

Mr. EDWARDS. That is satisfactory, your Honor.

539 The COURT. Very well. Civil Action 705 is marked "Ready" by agreement of counsel and by further agreement it is assigned for hearing on June 2nd at 2:00 P. M.

Mr. EDWARDS. I should think, your Honor,—may I just bring up one point—that on the orders on the decision made this morning on the motions to quash that perhaps it would be more convenient to wait until your Honor handed down his written memorandum on the three motions heard on May 3rd. We could present orders on all those things at the same time.

The COURT. It is immaterial to the Court the way in which you do it, gentlemen.

(Adjourned at 11:40 A. M.)

540. I hereby certify that the foregoing, Pages 1 to 15, inclusive, is a true and accurate transcript according to my stenographic notes.

EUNICE J. ARCHAMBAULT,
Official Reporter.

541. In United States District Court

*Order Denying Motion to Vacate Order on Motion for
Return of Photostat Copies of Documents—Filed*

June 1, 1948

The above entitled cause came on to be heard on the motion of the United States entitled "MOTION TO VACATE ORDER ON MOTION FOR RETURN OF PHOTOSTAT COPIES OF DOCUMENTS," and was argued by counsel; and thereupon, upon

consideration thereof, it is hereby ORDERED, ADJUDGED AND DECREED that said motion be, and it hereby is, denied.

Entered as the order of Court this 1st day of June, 1948.

JOHN P. HARTIGAN, /s/
United States District Judge.

542 In United States District Court.

*Order Denying Motion for Production of Documents
Under Rule 34—Filed June 1, 1948*

The above entitled cause came on to be heard on the motion of the United States entitled "MOTION FOR PRODUCTION OF DOCUMENTS UNDER RULE 34," and was argued by counsel; and thereupon, upon consideration thereof, it is hereby ORDERED, ADJUDGED and DECREED that said motion be, and it hereby is, denied.

Entered as the order of Court this 1st day of June, 1948.

JOHN P. HARTIGAN, /s/
United States District Judge.

543 In United States District Court

*Order Denying Motion for Production of Photostatic
Copies of Documents Surrendered by Plaintiff—
Filed June 1, 1948*

The above entitled cause came on to be heard on the motion of the United States entitled "MOTION FOR PRODUCTION OF PHOTOSTATIC COPIES OF DOCUMENTS SURRENDERED BY PLAINTIFF," and was argued by counsel; and thereupon, upon consideration thereof, it is hereby ORDERED, ADJUDGED and DECREED that said motion be and it hereby is, denied.

Entered as the order of Court this 1st day of June, 1948.

JOHN P. HARTIGAN, /s/
United States District Judge.

544 In United States District Court

*Order on Motion to Extend, Without Prejudice, Date for
Compliance With Subpoenas Duces Tecum, or, in the
Alternative, to Quash Such Subpoenas—Filed
June 1, 1948*

The above entitled cause came on to be heard on the motion filed in behalf of defendants, Wallace & Tiernan Com-

pany, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, and Industrial Appliance Corporation, entitled "MOTION TO EXTEND, WITHOUT PREJUDICE, DATE FOR COMPLIANCE WITH SUBPOENAS DUCES TECUM, OR, IN THE ALTERNATIVE, TO QUASH SUCH SUBPOENAS," and was argued by counsel; and thereupon, upon consideration thereof, it is hereby ORDERED, ADJUDGED and DECREED as follows:

That the subpoenas *duces tecum* referred to in said motion be, and they hereby are, quashed and vacated.

Entered as the order of Court this 1st day of June, 1948.

JOHN P. HARTIGAN, /s/
United States District Judge.

545

In United States District Court

Order Quashing Subpoena—Filed June 1, 1948

This cause came on to be heard on motion of Proprietors, Inc. dated May 18th, 1948 for an order quashing the subpoena for production of documents dated May 12, 1948 and served on it on the 14th day of May, 1948 and was argued by counsel and thereupon, on consideration thereof, it is

ORDERED

that said subpoena for the production of documents be and the same is hereby quashed.

JOHN P. HARTIGAN, /s/
Judge.

June 1, 1948.

546

In United States District Court

Order Quashing Subpoenas—Filed June 1, 1948

This cause came on to be heard on motion of Builders Iron Foundry dated May 18, 1948 for an order quashing the subpoenas for production of documents dated May 12, 1948, and served on it and Proprietors, Inc. on the 14th day of May, 1948 and was argued by counsel and thereupon, upon consideration thereof, it is

ORDERED

that said subpoenas for the production of documents be and they are hereby quashed.

JOHN P. HARTIGAN, /s/
Judge.

June 1, 1948.

547

In United States District Court

Transcript of Trial Proceedings

Before His Honor, Judge Hartigan, Wednesday, June 2,
1948.

APPEARANCES.

For the GOVERNMENT, Grant W. Kelleher, Esq.; Special Assistant to the Attorney General Alfred Kärsted, Esq., Special Attorney.

For the DEFENDANTS, Wallace & Tiernan, Charles H. Tuttle, Esq.; Loren X. Wood, Esq.; Edwards & Angell, William H. Edwards, Esq., Gerald W. Harrington, Esq., and John V. Kean, Esq., appearing.

Novadel-Agene Corporation, Industrial Appliance Corporation, Hogan & Hogan; Robert Coogan, Esq., appearing.

Builders Iron Foundry, Hinkley, Allen, Tillinghast & Wheeler; Chauncey Wheeler, Esq., S. Everett Wilkins, Jr., Esq., Matthew W. Goring, Esq., appearing.

Fairbanks, Morse & Co. Tillinghast, Collins & Tanner; Harold E. Staples, Esq., appearing.

548-549

Wednesday, June 2, 1948

2:15 P. M.

Colloquy

MR. KELLEHER. The Government is ready.

MR. TUTTLE. May I ask your Honor—in view of the colloquy which we had and the statements made by Mr. Kelleher that he was going to make a statement, and I made the observation if there was to be a trial, we, of course, would desire adjournment, and he assured us there would be no trial—for what purpose and what end is Mr. Kelleher now ready?

MR. KELLEHER. I am ready to open our case, your Honor.

MR. TUTTLE. Well, if your Honor please, that is a little too cryptic for me and I certainly feel called upon to call your Honor's attention to statements that were made in the record at the last hearing. Mr. Kelleher said at Page 11:

"I wish to assure counsel and the Court that in view of the rulings of the Court announced today, the Government does not intend to offer evidence if a date is granted as we have requested."

And at Page 9 Mr. Kelleher said:

"We would like a date set by your Honor at which the Government may make its statement which I have indicated we intend to make concerning our ability to go forward in the case. I am not prepared to make such a statement this morning but I would like to have a definite date set when I may make that statement; so that the record may be perfectly clear about the extent of it and the reasons for it."

I then made the point that I felt that we should
550 have some assurance that that indication of the Government's intention did not embrace an intention to be ready for trial or to go forward with the case in the sense of opening a trial; and Mr. Kelleher, as I understand it and as the language which I have just read shows, gave that assurance.

Your Honor then asked us what our attitude was and I said:

"I feel, your Honor, under those circumstances we would scarcely be required to participate further than to lend our presence."

Now I feel, therefore, that the defense is entitled to some statement of what this language means about being ready and about preparing to open the case. That is language of trial. It isn't language that, in my judgment, is consonant with what I have just read from the record and in reliance on which we have presented ourselves today.

Mr. KELLEHER. May it please your Honor, as I explained before, I don't believe the Government is committed to any particular procedure simply because we outlined a procedure to your Honor before. I wish to state now that in accordance with Mr. Tuttle's statement that there would be no trial "in the usual sense of the word," which is the precise language which he used throughout his statement, that that is correct. I advised counsel Mr. Edwards last

551 week that we would like to put one witness on the stand, Mr. Karsted. I think it will become clear as we proceed this afternoon that the defendants will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time. I think the best procedure is to permit me to proceed and then if your Honor finds there is any prejudice to the defendants at all, of course, the power is there to continue the matter if necessary.

Mr. TUTTLE. Putting a witness on the stand is, I suppose, for the purpose of testifying and to testify in the develop-

ment of a case. Otherwise, such testimony would have no relevancy or pertinency, no place in this court. If the purpose is to aim at something else, to hit some other bull's eye, why, of course, that is different. But we cannot, in view of the carefully guarded language which Mr. Kelleher is now using and which can—I say this without any intention to be invidious—can be interpreted by us, perhaps by the Court, in various ways—we feel that we should have an explanation. I have said that if we were to have a trial or anything like a trial, we would want to have several months of adjournment because we haven't been getting ready. We have been told that we need not get ready, and to be told simply now that we wouldn't be prejudiced deprives us of the material and basis on which to judge that for ourselves.

552 Mr. KELLEHER. I can assure counsel they are perfectly prepared for what we are going to do this afternoon, and if anything comes up and you wish a continuance, we will consent to it. I am perfectly certain you will not need it, and will not request it.

Mr. TUTTLE. It does seem to me the function I am to perform is one on which I and my associates must exercise our judgment and not be asked in blindness to accept the other side's judgment, who are here to prosecute us.

Mr. KELLEHER. I think if I may make my opening statement to open the case it will become clear what we intend to do and that is in complete explanation, your Honor.

The Court. With the explanation given by Mr. Kelleher I shall consider the case marked "ready" with this observation, gentlemen: That if the defendants, in view of what has been stated at the last hearing and what has been stated here today, feel they need a continuance for any reason that think proper, the Court will grant that. Does that cover what you have in mind to some extent, Mr. Tuttle?

Mr. TUTTLE. Yes, your Honor. I am relying on the fact that your Honor has in mind that we received at the past hearing certain assurances and that we are here on the basis of those assurances and nothing else.

The Court. Very well, you may proceed, gentlemen, with that understanding. Mr. Kelleher?

553

Opening Statement

Mr. KELLEHER. May it please your Honor, all of the defendants in this action are charged with violating Sections 1 and 2 of the Sherman Act throughout the period

from 1917 to the date of filing the complaint. Specifically the defendants are charged with engaging in a combination and conspiracy in restraint of interstate trade and commerce in chlorinating equipment and with attempting to monopolize and monopolizing trade and commerce in such equipment. For purposes of opening the Government's case this afternoon, I desire to do no more than to invite the attention of this Court to paragraphs 3 to 5 inclusive of the complaint, which describe the defendants, to paragraphs 6 to 22 inclusive, which describe the nature of the trade and commerce involved in the complaint, and to paragraphs 24 to 44 inclusive, which particularly describe the offenses with which the defendants are charged.

The Government's evidence in this case is almost entirely documentary, consisting, with immaterial exceptions, of the documents from the files of the defendant companies and from Fairbanks, Morse & Company and Hellige, Inc. called for by subpoenas *duces tecum* issued out of this court on May 12, 1948. In the trial of this case this afternoon the Government proposes to attempt to offer those documents in evidence. If the Government is not permitted to do this, it proposes to offer secondary evidence concerning the contents of the documents.

554 We submit that the subpoenaed documents are relevant and material upon the factual issues raised by the complaint and the answers thereto. As is more particularly set forth in the affidavit of Alfred Karsted, Esq., filed in this case on April 14, 1948, in support of plaintiff's Motion for Production of Documents under Rule 34, the documents of the defendant Wallace & Tiernan companies called for in said motion and also called for by the subpoenas *duces tecum* served upon said companies would, if received in evidence, tend to prove most of the various elements of the charge set forth in paragraph 24 of the complaint. The other documents called for by said subpoenas *duces tecum* served upon said companies would, if received in evidence, also tend to prove certain of the allegations of paragraph 24 of the complaint. Similarly, the documents subpoenaed from the other defendant corporations support those allegations of paragraph 24 which are expanded and particularized upon in paragraphs 41 to 43 inclusive, of the complaint. When I said "defendant corporations," I also mean to include the documents of Hellige, Inc. and of Fairbanks, Morse.

The subpoenaed documents constitute substantially all of the Government's evidence in this case. Although the

Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. Most of such additional evidence would depend for its admissibility upon its connection with the defendants through other evidence; such connection can only be established through certain of the subpoenaed documents and the Government, therefore, cannot offer the additional evidence subject to connection unless it is permitted also to offer the subpoenaed documents. The rest of the additional evidence is so incomplete and piecemeal as to be virtually meaningless without the subpoenaed documents as a setting for such evidence. In other words, the additional evidence either depends upon the subpoenaed documents for its own admissibility or is unintelligible without them.

For the foregoing reasons, if the Court refuses to receive the subpoenaed documents in evidence or to take testimony as to their contents, the Government does not intend to offer any other evidence in its case.

I am ready to proceed with the Government's case, your Honor.

The COURT. You may proceed.

Mr. KELLEHER. I now call upon counsel for the Wallace & Tiernan companies to produce the documents subpoenaed by order of this Court on May 12, 1948.

556

Reply

Mr. TUTTLE. Your Honor please, no notice to produce any documents today has ever been given to any of us. On the contrary, from the representations made—assurances—by Mr. Kelleher at the last hearing on May 24th, the record of which will be part, I assume, of the record of today's proceeding, we were certainly entitled to believe that no such call would be made upon us. I know of no announcement that has been made to any counsel between May 24th and this moment that we were being asked to produce any documents. But aside from that we made a motion to vacate the several subpoenas which have been alluded to by Mr. Kelleher. Those motions were argued before your Honor on May 24th. Mr. Kelleher stated at the time that the logic of the prior decisions,

which had been made by your Honor in the indictment action and in the information action, were such that the vacating of those subpoenas would follow as a matter of logic and as a matter of law. Orders vacating those subpoenas have been entered. We, therefore, are not in possession here today of the documents because no notice to produce, as required by law, was served; and, furthermore, as an additional reason—not as an exclusive reason but as an additional reason—our obligation alleged by Mr. Kelleher to produce documents has been ruled on as a matter of law and an order has been entered stating the fact that, for the reasons set forth in your Honor's opinion, 557 the obligation does not rest upon us.

Mr. KELLEHER. I move the Court to vacate the order entered yesterday quashing the subpoenas against the Wallace & Tiernan companies to permit me to obtain the documentary evidence called for by the subpoenas.

Mr. TURTLE. May I point out to your Honor just for the sake of the record—and I am fully aware that your Honor is fully aware of the fact—this is really an effort to reargue what has been argued, by actual count, six times before your Honor, and no motion of that character has been given to us in advance. There has been no compliance with the rules with reference to a motion to reargue or with reference to the making of the motion and, in consequence, as well as for reasons of substance, I feel that this motion is not properly before the Court, and even if it were, could not be entertained.

Mr. KELLEHER. I call your Honor's attention to Rule 7(b) of the Federal Rules of Civil Procedure which provides that

"An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing."

I think, therefore, that my oral motion at this time is appropriate and I request your Honor to rule upon it.

Mr. TURTLE. I respectfully submit that that rule—the language which was just read—does not apply to a motion to vacate prior orders of the Court and applies only 558 to motions in connection with details or the routine in the course of a trial; and if there were to be a motion to vacate orders already entered, we were entitled to full notice of it so that we could make a record.

The Court. What rule are you relying on, Mr. Kelleher, 7(b)?

Mr. KELLEHER. 7(b), sub-paragraph (1).

Ruling on Motion to Vacate

The COURT. The Government's motion is denied. The Court is of the opinion it is not in compliance with Rule 7(b) (1).

Mr. KELLEHER. May I ask your Honor in what respect it does not comply with the rule?

The COURT. The Court has ruled.

Mr. KELLEHER. Would your Honor prefer—Do I understand it is because it is not in writing?

The COURT. I have made my ruling, Mr. Kelleher. (To the reporter) Read it back to him.

(Ruling of the Court read by reporter as follows:

"The Government's motion is denied. The Court is of the opinion it is not in compliance with Rule 7(b) (1).")

Mr. KELLEHER. I am a little bit in the dark, your Honor, on the basis of the ruling. If the ruling is simply because I am not procedurally correct, I would like to have an opportunity to correct the procedure. If, on the other hand, the ruling is—

The COURT. Mr. Kelleher, it is not for the Court to do other than rule in this case on any motions. I made the ruling. What you are wrong—

Mr. KELLEHER. I think counsel is entitled to an opportunity to correct any error that exists.

The COURT. You made an oral motion to vacate the order to quash subpoenas of Wallace & Tiernan. That is the substance of the motion.

Mr. KELLEHER. Yes, sir.

The COURT. And you made it, in your opinion, in accordance with Rule 7(b) (1). The defendant has objected to the motion and I have made the ruling on the objection.

Mr. KELLEHER. And their objection was two-fold, your Honor, as I understand it, procedural and substantive. Do I understand that substantively the motion is also denied?

The COURT. Yes.

Mr. KELLEHER. Thank you, your Honor. Mr. Karsted? Excuse me. May I also have it understood that the same objection would be taken by the defendant, Proportioneers, and the same ruling made by the Court?

Mr. WILKINS. I am not aware, your Honor, that Proportioneers is a defendant.

Mr. KELLEHER. Excuse me, your Honor. Builders Iron. I beg your pardon.

Mr. WILKINS. I am not aware any motion has been made with respect to Builders Iron yet.

Mr. KELLEHER. I now call upon Builders Iron Foundry to produce documents subpoenaed on May 12, 1948.

Mr. WILKINS. That request is refused for the same reasons as stated to the Court by Mr. Tuttle when a similar request was made to Wallace & Tiernan. No notice to produce has been given us. We had no reason to expect we would be called upon for these documents, and our obligation to produce them has already been determined by this Court upon our motion to quash subpoenas *duces tecum*.

Mr. KELLEHER. And I now move the Court to vacate the order of June 1st quashing the subpoena *duces tecum* served upon Builders Iron.

Mr. WILKINS. That motion is objected to both because it is not in proper form under the rules and because the substance of the motion has already been determined by this Court.

The Court. The Court makes the same ruling as it did in the case of the Wallace & Tiernan companies, Mr. Kelleher. It is substantially the same motion.

Mr. KELLEHER. Thank you, your Honor. Mr. Karsted.

ALFRED KARSTED, sworn.

Direct Examination:

1 Q. (By Mr. KELLEHER) Mr. Karsted, you are a Special Attorney in the Antitrust Division of the Department of Justice?

A. I am.

561 2 Q. And you have for at least three years been engaged in the preparation of this case and the companion criminal case?

A. I have.

3 Q. Did you participate in the Grand Jury investigation out of which the two cases arose?

A. Yes, I did.

4 Q. During the course of that participation did you examine documents which were produced before the Grand Jury pursuant to subpoenas *duces tecum*?

A. I did.

5 Q. Specifically, did you examine documents produced by the defendant, Wallace & Tiernan Company?

A. I did.

6 Q. Did you examine a letter which I identify as one from H. S. Hutton to A. L. Frick, dated July 16, 1940?

A. I did.

Mr. TUTTLE. Wait a moment, please.

The COURT. The answer may be stricken. Wait until he finishes the objection. — Mr. Kelleher, H. S. Hutton to.

Mr. KELLEHER. A. L. Brick. Did your Honor get the date?

The COURT. No. Give me that, please. Objection was being made.

Mr. KELLEHER. July 16, 1940.

562 Mr. TUTTLE. I object on various grounds. In the first place, it doesn't seem to me that it is material and relevant in this case for any purpose even assuming that we were on trial—I made that assumption solely for the sake of argument—because it is immaterial and irrelevant whether Mr. Kelleher identifies the document which answers to that description or whether he identified it in the past.

In the second place, and more particularly, I gather from what Mr. Kelleher has said at the outset where he said: "For the purposes of trial of this case this afternoon, the subpoenaed documents"—that is, subpoenaed by the subpoenas of the unconstitutional Grand Jury—constitute practically all of the Government's case." This is simply an indirect way of attempting to make use of the information contained in those documents, and, to go further, to make some kind of use of the documents themselves either by direct evidence or by secondary evidence as to their contents, all of which would be a complete violation of the orders and decisions of this Court and particularly the order that was entered on April 20, 1948, in Criminal Action 6070 and the orders that were entered yesterday in this civil action.

I feel, therefore, that this questioning brings nothing before the Court that is admissible in this case so far.

563 Mr. WILKINS. Note my objection on behalf of my clients on the same ground.

The COURT. Well, of course, at the moment the Court doesn't know whether that is one of the letters involved in the previous decisions.

Mr. KELLEHER. I should have asked Mr. Karsted that.

7 Q. That is one of the documents called for by the subpoenas served upon Wallace & Tiernan?

A. Yes, it is.

The COURT. And if you will clear it up, Mr. Kelleher, is it one of those documents that the Court ordered returned?

Mr. KELLEHER. Yes, sir, it is.

The COURT. There is no question about that. It is one of the photostats?

Mr. KELLEHER. Yes; it is one of the documents that was returned when your Honor released the documents from impoundment, and the photostat of that document was later returned. So we do not have the document, and the purpose of the testimony is to adduce secondary evidence concerning the contents of the document which we cannot offer in evidence.

Mr. TUTTLE. I add to my objection, in view of that statement, your Honor, that there is no basis recognized by the law, as laid by this questioning, for the introduction of secondary evidence.

Mr. WILKINS. Your Honor please, may I add to 564 my objection the same grounds just submitted by Mr. Tuttle?

The COURT. The Court doesn't know all of the documents involved, and H. S. Hutton—to my recollection, he was one of the individual defendants, was he?

Mr. KELLEHER. Sales manager for the company.

The COURT. Was he indicted in this indictment?

Mr. KELLEHER. Yes, he was.

The COURT. For the moment I recollect the name. And he was sales manager for Wallace & Tiernan?

Mr. KELLEHER. That is my understanding.

The COURT. And this is information that you gained, Mr. Karsted, as a result of the illegal Grand Jury and involves documents that were ordered returned and photostats of which were ordered returned by the Court?

The WITNESS. That is right, your Honor.

The COURT. In view of that I shall sustain the objection. Your objection may be noted, Mr. Kelleher.

Mr. KELLEHER. Yes, sir, and may I have it, for the sake of saving time, understood on the record that the same objection and rulings would be made to testimony of Mr. Karsted concerning the contents of other of the subpoenaed documents which fall into the same class as the document—a letter from Hutton to Frick, dated July 16, 1940—that is, documents which were returned to the defendants pursuant to the order of the Court releasing them from impoundment because of an alleged unconstitutional search and seizure.

Mr. TUTTLE. Well, your Honor please, if I understand Mr. Kelleher, he is simply asking that he be permitted to have the same ruling in connection with documents—

whether documents that have the same characteristics, as your Honor brought out by your questioning of Mr. Kelleher; in other words, have all those attributes, to wit: a subpoena of the illegal Grand Jury; the production of documents or those documents on the compulsion thereof; the securing of the information Mr. Kelleher has from the opportunity afforded by the possession of those documents while they were impounded here; and the subsequent rulings of your Honor that those documents must be returned, the photostats made of them must be returned, and that the motion to vacate the subpoenas subsequently issued in this action must be granted.

If I said "Mr. Kelleher," I meant "Mr. Karsted." Of course, he is the witness on the stand.

Am I right in that, Mr. Kelleher?

Mr. KELLEHER. That is correct.

Mr. TUTTLE. Then I make the same three-fold objection: one, that I can't see that mere eliciting of identification is either material or relevant; second, that there has been no foundation laid for a chain of proof by way of secondary evidence—none of the procedure which is essential to proceeding by way of secondary evidence has been observed; and, thirdly, that the rulings already made from which the Government has not appealed conclude this question.

The COURT. With that understanding, gentlemen, naturally the Court's ruling would be the same on similar documents, Mr. Kelleher, that you might ask Mr. Karsted about, unless they might not have been obtained under the like circumstances as he has testified to in regard to the Hutton-Frick letter.

Mr. KELLEHER. Very well, your Honor, I have no further questions of the witness.

Mr. TUTTLE. I am sure we have none.

Mr. KELLEHER. May the witness be excused, your Honor?

The COURT. Yes. No cross-examination? Yes, Mr. Karsted, you are excused.

Mr. EDWARDS. If you will excuse me just a minute. (Mr. Edwards and Mr. Cogan confer.)

Mr. COGAN. To merely preserve the record, your Honor, on behalf of the defendants, Novadel-Agene and Industrial Appliance, I wish to join myself in the statements already made by Mr. Tuttle in this matter.

The COURT. Mr. Kelleher?

Mr. KELLEHER. Do I understand the same ruling on the motion to vacate with respect to the Wallace & Tiernan companies applies also to Novadel-Agene Company?

Mr. COOGAN. That is my understanding.

Introduction of Affidavit

567 Mr. KELLEHER. Yes. May it please your Honor, I would now like to file with the Court an affidavit by me in the nature of an offer of proof and in explanation of why the Government can offer no further evidence in the case.

Mr. TUTTLE. Might we have a few minutes to study this, your Honor? It seems to be of some length, and I would like to consult my associates about it.

The COURT. Take a short recess, and counsel will notify the Court when they are ready.

(Recess.)

Objection to Affidavit

Mr. TUTTLE. Your Honor, with your permission there are several preliminary matters I would like to see—or, at least, have cleared up. In the first place, this paper, which Mr. Kelleher has just brought forward, is, in form, an affidavit. I assume that it is not intended to gain anything of probative force or value by virtue of being drawn in the form of an affidavit rather than a statement or offer of proof, which, ordinarily, is not in affidavit form. I would be glad to have your Honor's permission to be assured by Mr. Kelleher that that is the case.

Mr. KELLEHER. It is an offer of proof. That is the purpose of it, Mr. Tuttle.

Mr. TUTTLE. There is nothing deemed added to it of probative force and effect by virtue of its being cast in the form of an affidavit?

568 Mr. KELLEHER. It is in the form of an affidavit in order to meet a somewhat novel situation, may it please the Court. Normally, I suppose documentary evidence would be marked for identification and, if excluded, would go up. In this instance we cannot obtain the documents even to mark them for identification so that I have followed this procedure in affidavit form in order to dignify it to the extent that it shows that the documentary evidence is relevant and material and, in the absence of His Honor's rulings, would be admissible. That is the purpose of the affidavit and its only purpose.

Mr. TUTTLE. Yes. You are not treating it as evidence being given under oath by you here today?

Mr. KELLEHER. I am not.

Mr. TUTTLE. Yes. Now, that being so, I come to my second preliminary consideration. This document refers, your Honor, to various past procedures.

The COURT. I didn't hear you, Mr. Tuttle.

Mr. TUTTLE. I say this document refers to various past procedures, orders, and in one instance or two instances, to the affidavit of Mr. Edwards filed at a certain time. I am concerned, therefore, about the extent of the background. As I understand it, this paper, call it what one would assume as the background the record thus far made in this court.

Mr. KELLEHER. That is correct.

Mr. TUTTLE. And I would like to assume equally
569 that in view of various statements by counsel, particularly by Mr. Kelleher, we might consider as part of the background the arguments here of April 20th, May 3rd, and May 24th, particularly in view of the fact that your Honor's decisions in the past have not only referred to things that occurred in the course of that argument on those different dates, but you have also quoted from certain statements made by counsel in the course of it.

Mr. KELLEHER. I have no objection to that, your Honor, providing those transcripts of the arguments are all of the transcripts of arguments in 705.

Mr. TUTTLE. I am so regarding it. In other words, all the arguments that happened on April 20th, May 3rd, and May 24th, as reported by the official stenographer.

Mr. KELLEHER. I have no objection to that. I have no objection to those transcripts becoming a part of the record, your Honor. If we were to find that there are other transcripts in 705—and I know of none at this time—we would also like those transcripts included as a part of the record for the sake of completeness, but I believe these transcripts that Mr. Tuttle has referred to are all of them.

Mr. TUTTLE. Then passing from the preliminary to the reasons why we make protest—not merely objection but
570 protest—against this document, I enumerate our positions as follows: In the first place, this document purports to utilize and to offer to the Court documents which have been excluded from legitimate possession by the Antitrust Department and which have been ordered returned because of illegal search and seizure; in

what we regard as clear violation of the *Rogers* case decided by the Circuit Court of Appeals in this circuit and in clear violation of your Honor's own orders, particularly the one of April 20th in Criminal Action 6070.

Not only the information and the evidence contained in these documents are here described but the documents themselves are constructively offered in evidence. I say we protest against that procedure.

Again treating this, however, as an offer of proof, it is not so much an offer of proof, as we view it, but more a statement of why the Government today is without a case. It is an explanation and not an offer of any substantive proof in the ordinary sense of the term as understood in a court of law. It is argumentative. It is an exposition of why the Government finds itself where it claims to find itself here. It is, above all, an explanation of the opinion of counsel. Counsel says that certain papers would be material and relevant and certain papers might or might not have—or in his judgment would have—relation to certain allegations in the complaint; papers which, as I have already said, are excluded, in my judgment, from
571 such use.

In addition, looked at as an offer of proof is it too general. It has no qualities of specificity about it. It relates to an entire case, not to any particular fact in the case. It is an explanation, as I said before, about the entire case and in no legitimate sense an offer of proof!

But aside from these considerations which, I think, are fully justified according to settled practice, there is the fundamental objection which can be stated as follows: That it is an effort to lament and bewail decisions which have already been made. It is cumulative. The Government's whole procedure today is to say over and over again what it has said five or six times before your Honor in the past without success. It is, to that extent, an effort to reargue, to re-present the issues which have been thoroughly ruled upon and which have become academic because the orders that your Honor made have been complied with, because there is no power in the Court sitting here in the civil action to review adjudications made either in the indictment action or in the information action; and even if there were such power, that power has been exercised adversely to the prosecution in the decisions on the motions which were argued here on May 3rd in this action and the motions which were argued here on May 24th in this action, on all of which

572 motions orders adverse to the Antitrust Division have been entered.

I feel also that to accept this motion would be not only a complete destruction and nullification of all these prior decisions; would be to allow not only a reargument thereof but a complete reversal thereof; but, in addition, basically, underneath it all, there is once more an effort to invade the constitutional rights of these defendants as established by your Honor's decision and as, I think, clearly established by the right interpretation of the United States Constitution.

I, therefore, ask that this paper be rejected.

The Court. Mr. Kelleher?

Mr. KELLEHER. May it please your Honor: the paper, as I have explained, as my affidavit, is an attempt to pursue a procedure which, contrary to what Mr. Tuttle says, I believe is about a fair a way as the defendants can possibly be treated in this action. As I explained, the normal procedure where evidence is excluded would be to have it marked for identification and then have that evidence go up as part of the record in the case if an appeal were taken.

Some time ago Mr. Tuttle objected violently to our being permitted to retain the documents because he thought we would spread those documents upon the record. The affidavit is designed to avoid just that, if it please the Court. We feel that with the law in the state that it is with your Honor's rulings outstanding that it might 573 be unfair to the defendants to spread the documents on the record. For that reason, in order to avoid it, I have tendered this affidavit which simply disposes of an issue which would have to be disposed of in the trial of the case and which a court would have to consider on an appeal and that is: Are the documents documents which are relevant and material? Normally, in the case of a witness a proffer of proof is made. On the other hand, if it is a non-jury case, under Rule 43 (c) the Court, upon request, may take or shall take and report the evidence in full.

Now, if Mr. Tuttle would prefer that we proceed that way, I will request the Court to order that the documents be produced so that they can be incorporated in the record of the case. I am satisfied, however, if your Honor permits the affidavit to stand and to avoid that procedure.

Mr. TUTTLE. If your Honor please, I clearly am not in charge of the prosecution's case and I am under no obligation to make suggestions. Furthermore, counsel has in the

past made his motions under Rule 34 and otherwise to compel production as stated in these motion papers for use at the trial. In addition to that, he subsequently brought forward subpoenas which he described to your Honor as being served for the purpose of bringing forward documents, these very documents, that he is now referring to for use at the trial.

574. Consequently, it is perfectly plain that this paper here is merely a third reference to those documents after your Honor has held that we were not obligated to make such production either on the motion for discovery and inspection or in connection with compliance with the subpoenas.

Ruling on Introduction of Affidavit

The Court. Well, I think, gentlemen, from my quick reading of the affidavit during the recess—of course, it states many qualifications of the affiant. The concluding sentence of the affidavit says:

“In short, therefore, the Government’s case in its present posture can be proved only by the subpoenaed documents.”

That is a conclusion because the element of the question of the admissibility of any such documents will be passed upon by the Court at the proper time. However, I am going to allow the affidavit to be filed because, in the opinion of the Court, it is nothing more than a statement by the Government why it is unable to proceed with the case further today. The affidavit may be filed.

Mr. KELLEHER. Your Honor, Mr. Staples has called my attention to the fact that an order has not been entered on behalf of Fairbanks, Morse on the quashing of the subpoenas. Your Honor’s opinion, of course, rendered ten days ago ordered that subpoena quashed. The same situation is true of Hellige. I have told Mr. Staples that while

575 we object, of course, to the entry of orders on behalf of those two companies, in view of the opinion of the Court and the orders entered on June 1st, we consent as to form to the entry of similar orders on behalf not only of Fairbanks, Morse but of Hellige.

The Court. Do you wish, gentlemen, to let it stand as the statement is now made by Mr. Kelleher or do you wish to submit written orders?

Mr. STAPLES. It is my intention to submit a written order.

The COURT. Is that satisfactory to both?

Mr. KELLEHER. Yes, your Honor.

The COURT. Very well, gentlemen, you may do that at your convenience.

Mr. KELLEHER. Now, your Honor, the plaintiff rests.

Mr. WILKINS. If the Court please, I did not formally place upon the record my concurrence in Mr. Tuttle's motion to reject the paper proffered but I wish to do so on behalf of Builders Iron Foundry and Mr. Chafee.

Mr. COGAN. And I likewise, your Honor, on behalf of Novadel-Agene and Industrial Appliance wish to do likewise.

Mr. TUTTLE. Well, your Honor, I cannot conceive what I am called upon to say or do. The plaintiff says in this
576 statement in the sentence referred to by your Honor—

The COURT. I can't hear you, Mr. Tuttle.

Mr. TUTTLE. I say I don't see what I am called upon to say further than what your Honor has already said. You have called attention to the sentence in the affidavit which has been accepted for the limited purpose your Honor stated. That sentence reads:

"In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents."

At the appearance before your Honor on April 20, 1948, Mr. Kelleher said—and I would like to emphasize this—at Pages 10 and 11 of the transcript of that argument:

"Mr. KELLEHER. Just a day certain so that we can issue our subpoenas. At that time if the subpoenas *duces tecum* have been denied, if the motions for discovery have been denied, if your Honor refuses to permit us to use the photostats for preparation for trial, we are prepared to announce to the Court that the Government is unable to proceed further in the trial of the case; that the Government has no evidence of any substantial amount on the basis of which it can go ahead with the trial; and we will, therefore, suggest to your Honor that you enter judgment with prejudice against the Government and from that judgment we shall appeal directly to the Supreme Court of the United States."

Now, on the argument before your Honor on May 24th in connection with the motions to vacate the subpoenas, which motions were granted, Mr. Kelleher

577 read to your Honor what I have just read. In other words, he read his own statement made on April 20th. And then he said:

"Since making that statement we have been considering whether judgment with prejudice or without prejudice should be entered, and I do not intend to concede that the judgment to be entered should be with prejudice. That is a legal issue which we are prepared to present to your Honor at the appropriate time."

Now, in view of the fact that he has stated that this procedure was all devised as a kind of mechanics for which I don't know precedent, through which he hopes to conduct a certain appeal or appeals—and I do not agree with his ability to do so—I cannot see how I can be called upon to facilitate a mechanism of procedure of that kind. In view of his own affidavit, in view of what I read to the Court, I interpret the situation as really a throwing up of hands by the Government, an abandonment of the case, a discontinuation of a non-prosecution—whatever the phraseology is.

Request to Enter Judgment for Plaintiff

MR. KELLEHER. Your interpretation, Mr. Tuttle, is in correct. The Government has opened its case, has attempted to present what evidence it could, has had its case blocked after the case has been opened. The Government does not suggest nor consent to the entry of judgment for the defendants. I wish the record to state that any judgment

578 entered in this case is over the objection of the plaintiff. I say that now, with the case in its present posture, the duty of the defendants is either to go ahead or if they decline to do so, then the duty of the Court—it is the duty of the Court to rule in this case. I urge your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint.

The COURT. On what grounds?

MR. KELLEHER. Grounds. I would like to rest on that statement, your Honor.

The COURT. No. You tell the Court on what grounds the Court should enter judgment for the plaintiff in view of the record here.

MR. KELLEHER. I merely suggest.

The COURT. The burden in any civil action is on the plaintiff to prove its case, is it not, by a fair preponderance of the evidence?

MR. KELLEHER. Yes, your Honor.

The COURT. How can any court enter judgment for any party who does not comply with the rule of law in that re-

regard? That is what you are asking the Court to do, Mr. Kelleher.

Mr. KELLEHER. I merely ask your Honor to do so.

The COURT. On what grounds, I am asking you. What grounds? Why should the Court—as the record stands, there is no evidence before the Court—give a judgment for a party that doesn't sustain its case?

579 Mr. KELLEHER. It may be your Honor's ruling.

The COURT. What is that?

Mr. KELLEHER. I say that may be your Honor's ruling but I wish that ruling to be made over my objection.

The COURT. I never heard of such a thing, of a Court being asked to do something that was not based upon evidence. Aren't you asking the Court to do something most unusual? I never heard of such a thing. If you haven't got some authority along that line—

Mr. KELLEHER. I am asking your Honor to dispose of the case.

The COURT. To dispose of the case? On what grounds shall I dispose of the case? That is what I am trying to find out. You say you want judgment for the plaintiff?

Mr. KELLEHER. Yes, sir, that is what I want.

The COURT. I am asking you to give the Court some reason why that motion should be granted. I would be glad to hear you. You can't just say you make a motion.

Mr. KELLEHER. It is not a motion, your Honor; a statement in summation.

The COURT. What is that?

Mr. KELLEHER. It is a statement in summation at the conclusion of the trial. The defendants have decided to go ahead.

580 The COURT. No, I haven't heard that statement yet made by the defendants.

Mr. KELLEHER. Perhaps I am premature then. I thought that they were not going to do anything here, and I then in summation simply asked your Honor to enter judgment for the plaintiff and rest on that.

The COURT. Well, perhaps I didn't quite hear what the defense said in that regard. Will you read that, Mrs. Archambault?

(Statement by Mr. Tuttle read by reporter as follows:

"In other words, he read his own statement made on April 20th. And then he said:

"Since making that statement we have been considering whether judgment with prejudice or without

prejudice should be entered, and I do not intend to concede that the judgment to be entered should be with prejudice. That is a legal issue which we are prepared to present to your Honor at the appropriate time.

"Now, in view of the fact that he has stated that this procedure was all devised as a kind of mechanism for which I don't know precedent, through which he hopes to conduct a certain appeal or appeals—and I do not agree with his ability to do so—I cannot see how I can be called upon to facilitate a mechanism of procedure of that kind. In view of his own affidavit, in view of what I read to the Court, I interpret the situation as really a throwing up of hands by the Government, an abandonment of the case, a discontinuation of a non-prosecution—whatever the phraseology is."

The COURT. That is substantially as I understand it, Mr.

581 Kelleher, without a statement on the part of the defense. I say I substantially understood that statement as read to me by the reporter. You say you rest. I take it the effect of the defense at the moment is of not saying anything.

Mr. KELLEHER. That is my understanding.

The COURT. At the moment, in asking you whether you are asking for a discontinuance or dismissal of the action, you come back and ask for judgment for the plaintiff.

Mr. KELLEHER. That is correct.

The COURT. Do we understand each other then on that?

Mr. TUTTLE. Yes, your Honor. They haven't proved a thing today. They undertook to call this trial. Not only have they not proved a thing but they are saying now in this very affidavit that they have nothing which they can legitimately bring forward as proof under the rulings that have already been made. That being so, I don't see that we are called upon to facilitate a future mechanism that is strange and, to us, of a completely non-understandable character by going on and making speeches and asking for various forms of relief. They have said we have proved nothing. I can't conceive that that is anything else except discontinuance or non-prosecution.

Mr. KELLEHER. I understand that is a declination on the part of counsel to go forward for reasons which he advances and with which I disagree. In other words, we have
582 reached the stage now where the Government has attempted to put in its case and has rested. The defense can either go ahead or sit still. If the defendant sits still, the duty is upon the Court to rule.

MR. TUTTLE. The prosecution has rested upon nothing. It says it has rested. There is no magic in those words. It has just done nothing in a legal sense here today.

THE COURT. That is the difficulty, gentlemen, you are confronting the Court with; to put it bluntly and plainly; and, frankly, as the Court knows, the Government hasn't given anything to the Court that would warrant the Court in granting your request for judgment. I don't see upon what basis, as the record stands, that any court of law could comply with such a request. It seems to me it is most unusual.

MR. KELLEHER. All I ask your Honor is to rule.

THE COURT. No, you have gone further than that now, Mr. Kelleher. You have asked the Court to give a judgment in the plaintiff's favor.

MR. KELLEHER. I have, your Honor.

THE COURT. And you rest on that without telling the Court on what basis should a court of law, on the record, grant such a motion. I am willing to listen to any arguments you may have on that. I appreciate too the situation, as you frankly stated it at other hearings, and the plans you have. I have all that in mind. As I say I am willing to listen to you, to see you sustain that position, but it seems you are asking the Court to do, as I say, something that—

MR. KELLEHER. I simply present it to your Honor, if I may. That is all I am doing.

THE COURT. State it as frankly as you wish.

MR. KELLEHER. You understand, we are in this situation, as we see it.

THE COURT. State it as frankly as you wish, Mr. Kelleher.

MR. KELLEHER. We are in this situation where a plaintiff has opened his case, has attempted to prove his case, and his evidence has been excluded. At that stage the defendant elects whether he rests, whether he moves to dismiss, and goes ahead. If he sits there, it seems to me it is the duty of the Court to find out what the defendant is going to do. If the defendant is going to do nothing, the Court takes the case as it is presented and decides it.

THE COURT. Of course, the Court hasn't got any case to decide on the evidence. That is the difficulty.

MR. KELLEHER. The plaintiff is in the position where all of its evidence has been excluded.

THE COURT. Yes, I understand the difficulty you have in that regard. I appreciate that very much. I am also unable

583 to follow you on the request that you have made that judgment should be entered in behalf of the plaintiff.

MR. KELLEHER. Your Honor, I cannot consent to the entry of any judgment.

THE COURT. What is that?

MR. KELLEHER. I cannot consent and do not intend to consent to the entry of any judgment against me.

THE COURT. Yes, I understand that.

MR. KELLEHER. I, therefore, urge your Honor to enter judgment for the plaintiff and invoke thereby the duty of the Court to rule in this case. I hope your Honor understands. I am not withholding anything from you but I am compelled under the law as it stands to pursue the policy which I am.

THE COURT. I shall hear from the defendants in regard to that.

MR. TUTTLE. Your Honor please, you have well stated it. The plaintiff—whether it is the Government or not—comes into court in a civil action shouldering the burden of proof and has made certain accusations. The affirmative is on the prosecution. If it fails to carry forward with any evidence at all, I can't see how it can, by that means, throw upon the defendant an adverse judgment. That would be the anomaly and novelty of winning a case by not proving a case. The less you prove, the more certain you are of judgment against your adversary. Then if you prove nothing, you have
584/ absolutely established conclusively your right to a judgment against your adversary, where you yourself have the burden of proof. I have never heard of such a proposition as that and it follows that they have no right to call upon us now to go ahead with a case where they haven't given us any case to go ahead against. They are a vacuum. We don't have to proceed to fill that vacuum. All this is brought about, your Honor, because the Anti-trust Division, for some reason or other, decided not to appeal from certain basic decisions; namely, in the criminal action, and having made that decision, they apparently now have come to the conclusion that they better try to retrace their steps and have a second thought and bring about a mechanism, and they are now trying to put the defendant in the position of ultimately saying, "Well, we go forward with the case against the vacuum;" and then move for a judgment on the merits, and they can take their appeal from that. I don't see that they can put us in that position at all. I think they have to confess, as they have confessed,

that they have no case at the present time available to them and that they have come to the end of the prosecution. It is non-prosecution.

I don't think we defendants are called upon at this point to say anything except to recognize the situation in which they are; and they ask your Honor, as well as all the world, to recognize that situation and they have asserted it 585 in the affidavit that they now have no case.

And I can't see that they are in any position to ask the Court to enter any such judgments as have been proposed here or, indeed, to enter any judgment at all. They have chosen to make this situation themselves for a purpose, which I cannot see how it can possibly succeed, but that is their affair and not mine. Now they have arranged their own bed and as far as I am concerned, all I can see is their recumbent form lying therein and I don't intend to pull them out of that bed.

MR. KELLEHER. Your Honor, I might say that, of course, the defense can sit there and do nothing, as Mr. Tuttle has indicated is the policy of the defense. However, I think the case has been brought to a logical conclusion. The Government has tried its case, has tried to put its evidence in; and if the defense does not intend to go forward with the evidence and does not intend to move for dismissal, then I say the duty is upon the Court to conclude this case, as it would any other case that was presented to the Court. In other words, the defendants now cannot escape, as they would like, the fact that the litigation must be concluded. I submit, if the defendants do not intend to go forward, then the Court has the inherent duty to dispose of the case in this court. The Government has tried the case insofar as it can. We 586 can do no more. We therefore, rest and the case is either in the hands of the defendants to go ahead or, if they decline or do not care to do so, then it is now in the breast of the Court.

MR. TUTTLE. Well, your Honor, on April 20th, Mr. Kelleher stated, in response to your Honor's question as to what he had in mind, that he intended to follow this procedure and to cap it with suggesting a judgment against the plaintiff with prejudice. On May 24th he said he wished to withdraw the words "with prejudice." He made no other withdrawal, no other modification of his statement. He left the record that way and, as far as I see, that is where the record now is. He was devising machinery so that he in the end would make a suggestion that there should be a judgment

against the plaintiff. Apparently, he thought that he would then take an appeal. It is not my purpose to discuss whether he could or could not appeal. I have said that we would oppose it. Now the record stands with the suggestion which he says he will make. Of course, if he doesn't care to make that suggestion now, I can't see how he can turn-around and say we have to make a suggestion.

Mr. KELLEHER. I don't say you have to do anything. May it please your Honor, just to keep the record straight—

The COURT. That is what I would like, gentlemen, so that I may be able to rule properly, as I see it.

Mr. KELLEHER. I would like this to be clear, your Honor.

When we explained weeks ago the procedure which we had in mind, I assumed I was doing it in order to—without commitment, without destroying my flexibility—to change my procedure as the case required. At that time I very frankly explained to the Court how we intended to proceed. As the case developed, it became apparent that it would be necessary to make a deviation. We have, of course,—I think it is perfectly apparent today—deviated from the procedure which we originally thought we would adopt. We, at one time, thought we would come and when the case was called for trial, simply state we were not ready to go to trial and could not go to trial. We decided, however, that the sound procedure, from the point of view of the plaintiff, would be to open our case, as I have today, to attempt to offer the evidence; as I have; in other words, to try the case, which we have done insofar as it is possible for the plaintiff to do. And that is the status of the matter. I cannot ask counsel—and do not—to move to dismiss. They are free to sit there, as they know. But I do insist that if they do nothing, then with the case concluded it is the duty of the Court to decide the case.

The COURT. Is there anything farther, gentlemen? The Court will reserve decision. I will tell you that now so that you both may proceed or not as you see fit. And I shall ask you, gentlemen, to submit authorities to the Court on this action. That is the position the Court is in at the moment. This is an unusual, most unusual, procedure and you are not going to have the snap judgment of the Court. I will examine the record and the rules and act accordingly.

Have the defendants anything further? Do the defendants rest?

Mr. EDWARDS. I didn't hear that last question.

The COURT. Do the defendants rest?

Mr. EDWARDS. Just a moment, Your Honor.
(Defense counsel confer.).

Mr. TUTTLE. Well, we are not going forward with anything, your Honor.

The COURT. The plaintiff has rested. There has got to be something here on the record, gentlemen. I shall examine the transcript today further to see what the nature of that motion is. It seems to me it is in the nature of a motion for judgment for the plaintiff, Mr. Kelleher.

Mr. KELLEHER. No, your Honor, it is not a formal motion. That statement was made simply in summation at the conclusion or what I thought was the conclusion of the case. Normally, I would sum up and say, "your Honor, I request judgment for the plaintiff."

The COURT. What is the difference between a request for judgment and a motion for judgment?

589 Mr. KELLEHER. None except that I wish to keep myself clear in the thing. At the conclusion of the case any party would, in summation, urge your Honor to enter judgment for him, and that is what I have done and that is where it rests. Now the defendants are trying to straddle here. I think they ought to fish or cut bait. They ought to rest or move for dismissal.

The COURT. I am asking if the defendants are resting too.

Mr. TUTTLE. I have stated, your Honor, that we interpret this situation as one where the Government—whatever terminology it chooses to use—nevertheless, is, in fact and in law, confessing non-prosecution; and that we do not, consequently, feel called upon to quarrel with the Government over that. Now we say frankly that under those circumstances we do not regard ourselves as required to go on with the evidence or with anything at all for that matter, and in that sense and in that sense only it can be said that the defense rests.

The COURT. That applies to all defendants, gentlemen?

Mr. WILKINS. If does, your Honor.

Mr. TUTTLE. In using that explanation, your Honor, I want it interpreted in the light of what I have said, that we are simply standing on the proposition that the Government has not undertaken to prove—has not proved a thing.

It is a vacuum.

590 The COURT. Very well.

Mr. TUTTLE. We are not resting the case in the sense that there is a prosecution which has been proved on as to which evidence has been presented. We are simply

saying that we regard this as non-prosecution and that we are not—

The Court. To be frank with you, gentlemen, that is what it appears to the Court at the moment. Whether I am right or not in that, I don't know, but I am going to take time to find out whether or not the Court has a right to dismiss this because of the record. Now, if you want to submit some authorities to me one way or the other—and that is in the Court's mind at the moment—you may do so, gentlemen.

At the moment it would seem that this Court, under Rule 41 (b) where it says:

"In an action tried by the court without a jury, the court, as trier of the facts, may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

Now, there is no evidence here before the Court and if you want the Court to make findings of fact under Rule 52, the Court will, of course, do so at the proper time. That is what it seems to me this case has gotten into, gentlemen. I am not making that as a decision but I am stating it to you for what it is worth. Do you follow me on that, Mr. Kelleher?

Mr. KELLEHER. I do, your Honor.

The Court. What facts are there before me on which I must make the findings? Is that what you are operating under?

Mr. KELLEHER. Yes, sir.

The Court. As I say, I just happened to look at that rule in regard to dismissal.

Mr. KELLEHER. You understand, your Honor, any dismissal is over my objection.

The Court. Of course, you are not going to get any shock in view of what the Court has already said at this hearing this afternoon on this rule. There is nothing for the Court to do, as I have indicated, but I want to look it up a little bit more.

Mr. KELLEHER. When would your Honor like memoranda?

The Court. Whatever time you gentlemen would like.

Mr. KELLEHER. (To Mr. Tuttle) What time do you think you would want?

The Court. We have gotten into an unusual situation here, as I say. That is why I don't want to make a ruling at the moment, but I have indicated to you what is in the

mind of the Court as far as this procedure is concerned now. Briefs, you say, gentlemen?

592 Mr. TUTTLE. My suggestion is if you will serve and file in a week, say, then we might have a week. If we don't decide to file any—

Mr. KELLEHER. Let's file at the same time, I would suggest.

Mr. TUTTLE. Very well.

The COURT. Ten days, gentlemen?

Mr. KELLEHER. Ten days are fine for us. All right, your Honor, we both file at the end of two weeks.

The COURT. That would be the 16th, gentlemen, and I have got to be in Boston on the 16th and 17th, so you can make it the 18th. June 18th, gentlemen.

(Adjourned at 4:10 P. M.)

I hereby certify that the foregoing, Pages 1 to 47 inclusive, is a true and accurate transcript according to my stenographic notes.

EUNICE J. ARCHAMBAULT,
Official Reporter.

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In United States District Court

Affidavit of Grant W. Kelleher, Esquire

Filed June 2, 1948.

GRANT W. KELLEHER of Wellesley, in the County of Norfolk, Commonwealth of Massachusetts, being first duly sworn, upon his oath, and on information and belief, deposes and says:

Affiant is a Special Assistant to the Attorney General of the United States. Since January, 1947, he has been, and is now, in active charge of the above-entitled case on behalf of the United States.

This case was filed on November 18, 1946, as a companion civil case to the criminal action entitled *United States v. Wallace & Tiernan Company, Inc., et al.*, Criminal No. 6055, the indictment in which was returned on the same day. The indictment has been superseded by an information filed on May 1, 1947, after the indictment was quashed. The indictment and information are substantially identical. The complaint and information name as defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Builders Iron Foundry, Novadel-Agene Corporation, Industrial Appliance

594 Corporation, and certain officials and employees of those corporations. The information also names as defendants Fairbanks, Morse & Company, Hellige, Inc., Schutte-Koerting Company, and certain officials or employees of Fairbanks, Morse & Company and Schutte-Koerting Company. The corporations named as defendants in both actions (except Schutte-Koerting Company) will be referred to herein as the defendant corporations.

The civil and criminal cases involve substantially the same violations of Sections 1 and 2 of the Sherman Act. The criminal action seeks to invoke the criminal sanctions of the Sherman Act for the violations alleged in the indictment; the civil action seeks to prevent and restrain those violations of the Act pursuant to Section 4 thereof. Both cases were brought following an extensive grand jury investigation conducted before an additional grand jury impaneled for the November 1945 term of this Court. During the course of this investigation hundreds of thousands of documents were produced before the grand jury by the defendant corporations pursuant to subpoenas *duces tecum* served upon them. From these documents approximately 8,000 were selected and photostated for presentation to the grand jury and for the preparation and trial of the cases rising out of the grand jury investigation.

All of the documents produced by the defendant corporations before the grand jury were returned to them pursuant to orders of this Court entered in the criminal action. A copy of such order entered on March 19, 1947, on behalf of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, and Novadel-Agene Corporation, is annexed as Exhibit C to the affidavit of William H. Edwards, Esq., filed in this action on April 30, 1948. After said documents were returned to the defendant corporations and on or about April 27, 1948, the aforesaid photostatic copies of certain of the documents made by the Government were surrendered

595 ed to the defendant corporations pursuant to orders of this Court entered in the criminal case. A copy of such order entered on February 18, 1948, on behalf of the defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, and Novadel-Agene Corporation is annexed as Exhibit H to the affidavit of William H. Edwards, Esq., filed in this action on April 30, 1948.

The effect of said orders of this Court has been to deprive the Government of all documents and photostatic

copies thereof produced by the defendant corporations before the grand jury and particularly the aforesaid 8,000 documents selected and photostated by the Government in the course of the grand jury investigation for use in prosecuting the cases arising out of said investigation. Therefore, to obtain said documents for use as evidence in the trial of this case the Government has caused to be issued to each of the defendant corporations subpoenas *duces tecum* commanding each of them to produce such of the documents as were the subject of photostatic copies made by the Government.

Affiant avers that the subpoenaed documents are relevant and material upon the factual issues raised by the complaint and answers thereto. As is more particularly set forth in the affidavit of Alfred Karsted, Esq., filed in this case on April 14, 1948, in support of plaintiff's Motion for Production of Documents under Rule 34, the documents of the defendant Wallace & Tiernan Companies called for in said motion and also called for by the subpoenas *duces tecum* served upon said companies would, if received in evidence, tend to prove most of the various elements of the charge set forth in paragraph 24 of the complaint. The other documents called for by said subpoenas *duces tecum* served upon said companies would, if received in evidence, also tend to prove certain of the allegations of paragraph 24 of the complaint. Similarly, the documents subpoenaed from the other defendant corporations support those allegations of paragraph 24 which are expanded and particularized upon in paragraphs 41-43, inclusive, of the complaint.

Affiant further avers that the subpoenaed documents constitute substantially all of the Government's evidence in this case. Although the Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. Such additional evidence would be offered largely to provide a referential frame for the subpoenaed documents. Much of said additional evidence depends upon the subpoenaed documents for its own admissibility; much is unintelligible without them. Furthermore, the Government has no present knowl-

edge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint, and, although conceivably such evidence might be obtained, that could only be done after an investigation co-extensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents.

GRANT W. KELLEHER /S/

Special Assistant to the Attorney General.

Duly sworn to by Grant W. Kelleher.

Jurat omitted in printing. (All in italics.)

597 In United States District Court

Opinion—Filed August 6, 1948.

HARTIGAN, J.

This is a civil action brought by the United States of America against the above named defendants under Section 4 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade in commerce against unlawful restraints and monopolies," as amended (15 U. S. C. § 4), commonly known as the Sherman Act, in order to prevent further alleged violations by them, jointly and severally of Sections 1 and 2 of said Act (15 U. S. C. §§ 1 and 2).

The defendants filed answers and the case was assigned for trial to June 2, 1948.

598 Grant W. Kelleher, Esq., Special Assistant to the Attorney General of the United States, stated:

"May it please your Honor, as I explained before, I don't believe the Government is committed to any particular procedure simply because we outlined a procedure to your Honor before. I wish to state now that in accordance with Mr. Tuttle's statement that there would be no trial in the usual sense of the word, which is the precise language which he used throughout his statement, that that is correct. I advised counsel—Mr. Edwards—last week that we would like to put one witness on the stand, Mr. Karsted." (Tr. 4.)

Mr. Kelleher, in his opening statement, said:

"The Government's evidence in this case is almost entirely documentary, consisting, with immaterial exceptions, of the documents from the files of the defendant companies and from Fairbanks, Morse & Com-

pany and Hellige, Inc., called for by subpoenas *duces tecum* issued out of this court on May 12, 1948. In the trial of this case this afternoon the Government proposes to attempt to offer those documents in evidence. If the Government is not permitted to do this, it proposes to offer secondary evidence concerning the contents of the documents. (Tr. 7.)

599 "The subpoenaed documents constitute substantially all of the Government's evidence in this case. Although the Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. Most of such additional evidence would depend for its admissibility upon its connection with the defendants through other evidence; such connection can only be established through certain of the subpoenaed documents and the Government, therefore, cannot offer the additional evidence subject to connection unless it is permitted also to offer the subpoenaed documents. The rest of the additional evidence is so incomplete and piecemeal as to be virtually meaningless without the subpoenaed documents as a setting for such evidence. In other words, the additional evidence either depends upon the subpoenaed documents for its own admissibility or is unintelligible without them.

"For the foregoing reasons, if the Court refuses to receive the subpoenaed documents in evidence or to take testimony as to their contents, the Government does not intend to offer any other evidence in its case.

"I am ready to proceed with the Government's case, your Honor."

Mr. Kelleher then stated:

"I now call upon counsel for the Wallace & Tiernan companies to produce the documents subpoenaed by order of this Court on May 12, 1948." (Tr. 8, 9.)

Mr. Tuttle stated:

600 "Orders vacating those subpoenas have been entered. We, therefore, are not in possession here today of the documents because no notice to produce,

as required by law, was served; and, furthermore, as an additional reason—not as an exclusive reason but as an additional reason—our obligation alleged by Mr. Kelleher to produce documents has been ruled on as a matter of law and an order has been entered stating the fact that, for the reasons set forth in your Honor's opinion, the obligation does not rest upon us." (Tr. 10, 11.)

"Mr. KELLEHER. I move the Court to vacate the order entered yesterday quashing the subpoenas against the Wallace & Tiernan companies to permit me to obtain the documentary evidence called for by the subpoenas." (Tr. 11.)

The Court denied the plaintiff's motion on the defendant's objection.

"Mr. KELLEHER. I now call upon Builders Iron Foundry to produce documents subpoenaed on May 12, 1948." (Tr. 13, 14.)

On objection by counsel for Builders Iron Foundry, the Court made the same ruling as it did in the Wallace & Tiernan objection.

The Government then called as its only witness in this trial Alfred Karsted, Esq., a Special Attorney in the Anti-trust Division of the Department of Justice. He testified:

601 "2 Q. And you have for at least three years been engaged in the preparation of this case and the companion criminal case?

A. I have.

"3 Q. Did you participate in the Grand Jury investigation out of which the two cases arose?

A. Yes, I did.

"4 Q. During the course of that participation did you examine documents which were produced before the Grand Jury pursuant to subpoenas *duces tecum*?

A. I did.

"5 Q. Specifically, did you examine documents produced by the defendant, Wallace & Tiernan Company?

A. I did.

"6 Q. Did you examine a letter which I identify as one from H. S. Hutton to A. L. Frick, dated July 16, 1940?

A. I did." (Tr. 15.)

The defendants objected to this question.

"The COURT. Well, of course, at the moment the Court doesn't know whether that is one of the letters involved in the previous decisions.

“Mr. KELLEHER. I should have asked Mr. Karsted that.

“7. Q. That is one of the documents called for by the subpoenas served upon Wallace & Tiernan?

A. Yes, it is.

“The COURT. And if you will clear it up, Mr. Kelleher, is it one of those documents that the Court ordered returned?

“Mr. KELLEHER. Yes, sir, it is.

602 “The COURT. There is no question about that. It is one of the photostats?

“Mr. KELLEHER. Yes, it is one of the documents that was returned when your Honor released the documents from impoundment, and the photostat of that document was later returned. So we do not have the document, and the purpose of the testimony is to adduce secondary evidence concerning the contents of the document which we cannot offer in evidence. (Tr. 17.)

“The COURT. And this is information that you gained, Mr. Karsted, as a result of the illegal Grand Jury and involves documents that were ordered returned and photostats of which were ordered returned by the Court?

“The WITNESS. That is right, your Honor.

“The COURT. In view of that I shall sustain the objection. Your objection may be noted, Mr. Kelleher.

“Mr. KELLEHER. Yes, sir, and may I have it, for the sake of saving time, understood on the record that the same objection and rulings would be made to testimony of Mr. Karsted concerning the contents of other of the subpoenaed documents which fall into the same class as the document—a letter from Hutton to Frick, dated July 16, 1940—that is, documents which were returned to the defendants pursuant to the order of the Court releasing them from impoundment because of an alleged unconstitutional search and seizure. (Tr. 18, 19.)

603

“Mr. TUTTLE. Well, your Honor please, if I understand Mr. Kelleher, he is simply asking that he be permitted to have the same ruling in connection with documents—whether documents that have the same characteristics, as your Honor brought out by your questioning of Mr. Kelleher; in other words, have all those attributes, to wit: a subpoena of the illegal

Grand Jury; the production of documents or those documents on the compulsion thereof; the securing of the information. Mr. Kelleher has from the opportunity afforded by the possession of those documents while they were impounded here; and the subsequent rulings of your Honor that those documents must be returned, the photostats made of them must be returned, and that the motion to vacate the subpoenas subsequently issued in this action must be granted.

"If I said 'Mr. Kelleher,' I meant 'Mr. Karsted.' Of course, he is the witness on the stand.

"Am I right in that, Mr. Kelleher?

"Mr. KELLEHER. That is correct.

"Mr. TUTTLE. Then I make the same three-fold objection; one, that I can't see that mere eliciting of identification is either material or relevant; second, that there has been no foundation laid for a claim to proceed by way of secondary evidence—none of the procedure which is essential to proceeding by way of secondary evidence has been observed; and thirdly, that the rulings already made from which the Government has not appealed conclude this question. (Tr. 19, 20.)

04 "The COURT. With that understanding, gentlemen, naturally the Court's ruling would be the same on similar documents, Mr. Kelleher, that you might ask Mr. Karsted about; unless they might not have been obtained under the like circumstances as he has testified to in regard to the Hutton-to-Frick letter.

"Mr. KELLEHER. Very well, your Honor, I have no further questions of the witness.

"Mr. TUTTLE. I am sure we have none.

"Mr. KELLEHER. May the witness be excused, your Honor?

"The COURT. Yes. No cross examination? Yes, Mr. Karsted, you are excused.

"Mr. COOGAN. To merely preserve the record, your Honor, on behalf of the defendants Novadel Agene and Industrial Appliance, I wish to join myself in the statements already made by Mr. Tuttle in this matter.

"The COURT. Mr. Kelleher?

"Mr. KELLEHER. Do I understand the same ruling on the motion to vacate with respect to the Wallace & Tiernan companies applies also to Novadel Agene Company?

• Mr. COOGAN. That is my understanding.

• Mr. KELLEHER. Yes. May it please your Honor, I would now like to file with the Court an affidavit by me in the nature of an offer of proof and in explanation of why the Government can offer no further evidence in the case." (Tr. 19, 20, 21.)

Mr. Kelleher's affidavit, the filing of which the defendants objected to, states in part:

605 "Affiant further avers that the subpoenaed documents constitute substantially all of the Government's evidence in this case. Although the Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. Most of such additional evidence would depend for its admissibility upon its connection with the defendants through other evidence; such connection can only be established through certain of the subpoenaed documents, and the Government therefore cannot offer the additional evidence *de bene* unless it is permitted also to offer the subpoenaed documents. The rest of the additional evidence is so incomplete and piecemeal as to be virtually meaningless without the subpoenaed documents as a setting for such evidence. In other words, the additional evidence either depends upon the subpoenaed documents for its own admissibility or is unintelligible without them. Furthermore, the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint and although conceivably such evidence might be obtained, that could only be done after an investigation coextensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents."

606 "Mr. KELLEHER. It is in the form of an affidavit in order to meet a somewhat novel situation, may it please the Court. Normally, I suppose documentary evidence would be marked for identification and, if excluded, would go up. In this instance we cannot obtain the documents even to mark them for identification so

that I have followed this procedure in affidavit form in order to dignify it to the extent that it shows that the documentary evidence is relevant and material and, in the absence of His Honor's rulings, would be admissible. That is the purpose of the affidavit and its only purpose.

“Mr. TUTTLE. Yes. You are not treating it as evidence being given under oath by you here today?”

“Mr. KELLEHER. I am not. (Tr. 22.)

The Court stated:

“* * * However, I am going to allow the affidavit to be filed, because, in the opinion of the Court, it is nothing more than a statement by the Government why it is unable to proceed with the case further today. The affidavit may be filed.

Thereupon the Government rested its case.

The defendants made no motions and offered no testimony.

“Mr. KELLEHER. * * * I say that now, with the case in its present posture, the duty of the defendants is either to go ahead or if they decline to do so, then the duty of the Court—it is the duty of the Court to rule in this case. I urge your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint.

607

“The COURT. On what grounds?”

“Mr. KELLEHER. Grounds—I would like to rest on that statement, your Honor.

“The COURT. No. You tell the Court on what grounds the Court should enter judgment for the plaintiff in view of the record here.

“Mr. KELLEHER. I merely suggest—

“The COURT. The burden in any civil action is on the plaintiff to prove its case, is it not, by a fair preponderance of the evidence?”

“Mr. KELLEHER. Yes, your Honor.

“The COURT. How can any court enter judgment for any party who does not comply with the rule of law in that regard? That is what you are asking the Court to do, Mr. Kelleher.

“Mr. KELLEHER. I merely ask your Honor to do so.

“The COURT. On what grounds, I am asking you. What grounds? Why should the Court—as the record

stands, there is no evidence before the Court—give a judgment for a party that doesn't sustain its case? (Tr. 32.)

"Mr. KELLEHER. It may be your Honor's ruling.

"The COURT. What is that?

"Mr. KELLEHER. I say that may be your Honor's ruling but I wish that ruling to be made over my objection.

608 "The COURT. I never heard of such a thing, of a Court being asked to do something that was not based upon evidence. Aren't you asking the Court to do something most unusual? I never heard of such a thing. If you haven't got some authority along that line—

"Mr. KELLEHER. I am asking your Honor to dispose of the case.

"The COURT. To dispose of the case? On what grounds shall I dispose of the case? That is what I am trying to find out. You say you want a judgment for the plaintiff?

"Mr. KELLEHER. Yes, sir, that is what I want.

"The COURT. I am asking you to give the Court some reason why that motion should be granted. I would be glad to hear you. You can't just say you make a motion.

"Mr. KELLEHER. It is not a motion, your Honor, a statement in summation.

"The COURT. What is that?

"Mr. KELLEHER. It is a statement in summation at the conclusion of the trial. The defendants have declined to go ahead. (Tr. 33.)

"The COURT. At the moment, in asking you whether you are asking for a discontinuance or dismissal of the action, you come back and ask for judgment for the plaintiff.

"Mr. KELLEHER. That is correct.

"The COURT. Do we understand each other then on that?

609 "Mr. TUTTLE. Yes, your Honor. They haven't proved a thing today. They undertook to call this trial. Not only have they not proved a thing but they are saying now in the very affidavit that they have nothing which they can legitimately bring forward as proof under the rulings that have already been made. That

being so, I don't see that we are called upon to facilitate a future mechanism that is strange and, to us, of a completely nonunderstandable character by going on and making speeches and asking for various forms of relief. They have said we have proved nothing. I don't conceive that that is anything else except discontinuance or non-prosecution.

"Mr. KELLEHER. I understand that is a declination on the part of counsel to go forward for reasons which he advances and with which I disagree. In other words, we have reached the stage now where the Government has attempted to put in its case and has rested. The defense can either go ahead or sit still. If the defendant sits still, the duty is upon the Court to rule.

"Mr. TUTTLE. The prosecution has rested upon nothing. It says it has rested. There is no magic in those words. It has just done nothing in a legal sense here today.

"The COURT. That is the difficulty, gentlemen, you are confronting the Court with, to put it bluntly and plainly; and, frankly, as the Court knows, the Government hasn't given anything to the Court that would warrant the Court in granting your request for judgment. I don't see upon what basis, as the record stands, that any court of law could comply with such a request. It seems to me it is most unusual.

"Mr. KELLEHER. All I ask your Honor is to rule.

610 "The COURT. No, you have gone further than that now, Mr. Kelleher. You have asked the Court to give a judgment in the plaintiff's favor.

"Mr. KELLEHER. I have, your Honor. (Tr. 35, 36.)

"Mr. KELLEHER. Your Honor, I might say that, of course, the defense can sit there and do nothing, as Mr. Tuttle has indicated is the policy of the defense. However, I think the case has been brought to a logical conclusion. The Government has tried its case, has tried to put its evidence in; and if the defense does not intend to go forward with the evidence and does not intend to move for dismissal, then I say the duty is upon the Court to conclude this case, as it would any other case that was presented to the Court. In other words, the defendants now cannot escape, as they would like, the fact that the litigation must be concluded. I submit, if the defendants do not intend to go forward,

then the Court has the inherent duty to dispose of the case in this court. The Government has tried the case insofar as it can. We can do no more. We, therefore, rest and the case is either in the hands of the defendants to go ahead or, if they decline or do not care to do so, then it is now in the breast of the Court." (Tr. 40, 41.)

"Mr. TUTTLE. Well, we are not going forward with anything, your Honor." (Tr. 43.)

The above is substantially the record of the trial upon which counsel for the Government said: "I urge your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint." (Tr. 32.)

61F I find that the plaintiff has not produced any facts or evidence in support of the complaint.

After the Government completed the presentation of its evidence the defendants did not move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The reality here practically amounts to non-prosecution since the Government states that other evidence than the suppressed documentary evidence "might be obtained" to establish violations of the Sherman Act.

In *Carnegie Nat. Bank v. City of Wolf Point*, 110 F. 2d 569, 572, the Court said:

"We have referred to the fact that Rule 41 of the Federal Rules of Civil Procedure does not specifically provide that a court may dismiss for want of prosecution, but that it does not limit the power of a court to dismiss to those instances enumerated because it suggests that there might be dismissals not provided therein. In any event, it is well settled, 'that a court of equity has general authority, independently of statute or rule, to dismiss a cause for failure or want of diligence in prosecution, in the exercise of a sound judicial discretion.' Longsdorf, *Cyc. Fed. Proc.*, vol. 4, p. 40; §1024; *Buck v. Felder*, D. C. Tenn., 208 F. 474, 477; *Colorado Eastern Ry. Co. v. Union Pac. Ry. Co.*, 8 Cir., 94 F. 312, 313. We are satisfied, therefore, that a dismissal for failure or want of diligence is within the power of a court of equity."

See also *Hicks v. Bekins Moving & Storage Co.*, 115 F. 2d 406.

In the instant case the Government seeks equitable relief.

In *Rudolph v. Senecker*, 39 App. D. C. 385, 388, the Court said:

"The plaintiff in every action at law where there is no admission of the facts alleged has the burden of proving the necessary allegations of his declaration. If he declines or fails to offer evidence, the court may in its discretion dismiss his action without prejudice, or enter a judgment against him."

The situation in the instant case is somewhat analogous to that in the *Senecker* case, *supra*.

The Government's "request" for judgment and relief prayed for in the complaint is denied and judgment may be entered dismissing the action without prejudice.

It is so ordered.

Docket Entry of Judgment in Accordance with the Foregoing Opinion

1948

Aug. 26—JUDGMENT entered dismissing the action without prejudice and the Government's "request" for judgment and relief prayed for in the complaint is denied.

613

In United States District Court

Petition for Appeal

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final decree of this Court entered on the sixth day of August, 1948, does hereby pray an appeal from said final decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings, and documents upon which said final decree was based, duly authenticated, be

sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

HERBERT A. BERGSON, /s/
Assistant Attorney General.

ALFRED KARSTED, /s/
Special Assistant to the
Attorney General.

Dated this 4 day of October, 1948.

614 In United States District Court

Assignment of Errors and Prayer for Reversal.

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on August 6, 1948, in the above-entitled cause, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in denying the Government's motion under Rule 34 of the Federal Rules of Civil Procedure for the production by defendant corporations of certain specified documents.

2. The court erred in denying the Government's motion for the production by defendant corporations of photostatic copies of documents previously surrendered by the Government in obedience to an order of the court.

3. The court erred in quashing the subpoenas *duces tecum* issued in May 1948 to defendant corporations and certain other corporations and in denying the Government's
615 motion to vacate the orders of the court quashing these subpoenas.

4. The court erred in excluding secondary evidence as to the contents of any document which had been produced before the grand jury which returned an indictment (No. 6055) against the defendants.

5. The court erred in basing each of the rulings covered by the errors assigned in Nos. 1-4, inclusive, upon the ground that the production of documents, pursuant to subpoenas *duces tecum*, before a grand jury which was improperly constituted violates the Fourth Amendment.

6. The court erred in basing each of the rulings covered by the errors assigned in Nos. 1-4, inclusive, upon the

ground that the prior production of documents, pursuant to subpoenas *decus tecum*, before an improperly constituted grand jury operated to bar the Government from obtaining these documents by appropriate legal process or procedure in another proceeding and from using the documents, evidence as to their contents, or information derived therefrom, as evidence in another proceeding.

7. The court erred in stating that when the Government rested its case at the trial after having been prevented by the court's rulings from presenting all evidence which it had which would establish the allegations of its complaint, the course pursued by the Government, "practically amounts to non-prosecution".

8. The court erred in entering judgment dismissing the Government's complaint.

Wherefore, plaintiff prays that the final decree of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

HERBERT A. BERGSON, /s/
Assistant Attorney General.

ALFRED KARSTED, /s/
Special Assistant to the
Attorney General.

Dated this 4 day of October, 1948.

616 In United States District Court
Order Allowing Appeal

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on the sixth day of August, 1948, and having also made and filed its petition for appeal, assignment of errors and prayed for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED
That the appeal be and the same is hereby allowed as prayed for.

JOHN P. IRETTIGAN, /s/
United States District Judge

Dated this 4th day of October, 1948

617 Citation in usual form omitted in printing.

619 In United States District Court

Proof of Service—Filed Oct. 4, 1948

Service of the petition for appeal, order allowing appeal, citation, assignments ~~of errors~~ and prayer for reversal, statement of jurisdiction, praecipe to clerk designating portions of record to be prepared, together with a statement directing attention to the provisions of paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, ^{acknowledged} is ~~accepted~~ and copies received this 4th day of October, 1948.

GERALD W. HARRINGTON, /s/
*Attorney for Wallace & Tiernan
 Company, Inc.,
 Wallace & Tiernan Products, Inc.,
 Wallace & Tiernan Sales Corporation,
 Martin F. Tiernan,
 William J. Orchard,
 Gerald D. Peet,
 Harold S. Hutton,
 Vincent Pisani,
 Cornelius F. Schenck.*

S. EVERETT WILKINS, JR., /s/
*Attorney for Builders Iron Foundry,
 Henry S. Chafee.*

HOGAN & HOGAN, EDWARD T. HOGAN, /s/
*Attorney for Noradel-Agenc Corporation,
 Industrial Appliance Corporation.*

620 In United States District Court

Praecipe for Transcript of Record

To: The Clerk, United States District Court,
 District of Rhode Island

The appellant hereby directs that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. All docket entries showing filing of the pleadings and papers hereinafter set forth, and the entry of the orders hereinafter specified.

2. The complaint.

3. Answer of Builders Iron Foundry and Henry S. Chafee filed May 14, 1947.

4. Government's motion filed April 14, 1948, to vacate order on motion for return of photostat copies of documents.

5. Affidavit of Alfred Karsted filed April 14, 1948, in support of motion to vacate order on motion for return of photostat copies of documents.

6. Government's motion filed April 14, 1948, for production of documents under Rule 34.

7. Affidavit of Alfred Karsted filed April 14, 1948, in support of motion for production of documents under Rule 34.

621 8. Affidavit of Chalmers Hamill filed April 14, 1948, in support of motion for production of documents under Rule 34 and motion to vacate order on motion for return of photostat copies of documents.

9. Government's motion filed April 22, 1948, for production of photostatic copies of documents surrendered by plaintiff.

10. Affidavit, together with exhibits thereto, of William H. Edwards filed April 30, 1948, in opposition to Government's three motions.

11. Affidavit of Frederick G. Merkel filed April 30, 1948, in opposition to Government's motion for production of documents under Rule 34.

12. Complete transcript of hearing of May 3, 1948, on Government's three motions, certified by the court reporter, together with such certificate.

13. Answer to complaint, filed April 30, 1948, of defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani, and Cornelius F. Schenck.

14. Answer to complaint, filed April 30, 1948, of defendants Novadel-Agene Corporation and Industrial Appliance Corporation.

15. Subpoena *duces tecum* of May 12, 1948, to Wallace & Tiernan Company, Inc.

16. Subpoena *duces tecum* of May 12, 1948, to Wallace & Tiernan Sales Corporation.

17. Subpoena *duces tecum* of May 12, 1948, to Wallace & Tiernan Products, Inc.

18. Subpoena *duces tecum* of May 12, 1948, to Fairbanks, Morse & Company.

622 19. Subpoena *duces tecum* of May 12, 1948, to Hellige, Inc.

20. Subpoena *duces tecum* of May 12, 1948, to Novadel-Agene Corporation.

21. Subpoena *duces tecum* of May 12, 1948, to Industrial Appliance Corporation.

22. Subpoena *duces tecum* of May 12, 1948, to Proportioners, Inc.

23. Subpoena *duces tecum* of May 12, 1948, to Builders Iron Foundry.

24. Motion of Builders Iron Foundry of May 18, 1948, to quash subpoena *duces tecum*.

25. Affidavit of S. Everett Wilkins, Jr. in support of motion of Builders Iron Foundry to quash.

26. Motion of Proportioners, Inc., of May 18, 1948, to quash subpoena *duces tecum*.

27. Motion of Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, and Industrial Appliance Corporation to extend date for compliance with, or to quash subpoenas *duces tecum*.

28. Motion of May 24, 1948, of Fairbanks, Morse & Co. to quash subpoenas *duces tecum*.

29. Motion of Hellige, Inc., of May 24, 1948, to quash subpoenas *duces tecum*.

30. Complete transcript of hearing of May 24, 1948, on motions to quash subpoenas *duces tecum*, certified by the court reporter, together with such certificate.

31. Order of Judge Hartigan entered June 1, 1948, denying Government's motion to vacate order on motion for return of photostat copies of documents.

623 32. Order of Judge Hartigan entered June 1, 1948, denying Government's motion for production of documents under Rule 34.

33. Order of Judge Hartigan entered June 1, 1948, denying Government's motion for production of photostatic copies of documents surrendered by plaintiffs.

34. Order of Judge Hartigan entered June 1, 1948, quashing subpoenas served on Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, and Industrial Appliance Corporation.

35. Order of Judge Hartigan entered June 1, 1948, quashing subpoena served on Proportioneers, Inc.

36. Order of Judge Hartigan entered June 1, 1948, quashing subpoena served on Builders Iron Foundry.

37. Complete transcript of the proceedings at the trial on June 2, 1948, including affidavit of Grant W. Kelleher there introduced, certified by the court reporter, together with such certificate.

38. Opinion of Judge Hartigan filed August 6, 1948.

39. Judgment dismissing action without prejudice entered August 6, 1948.

40. Petition for appeal.

41. Assignment of errors and prayer for reversal.

42. Statement as to jurisdiction. (certified separately)

43. Order allowing appeal.

44. Citation.

45. Statement calling attention to the provisions of Supreme Court Rule 12(3).

46. Proof of service of the appeal papers.

47. This praecipe.

HERBERT A. BERGSON, /s/
Assistant Attorney General.

ALFRED KARSTED, /s/
Special Assistant to the
Attorney General.

Dated this 4 day of October 1948.

623a

UNITED STATES
DEPARTMENT OF JUSTICE
Rm. 619 - 294 Washington Street
Boston 8, Massachusetts

60-170-3

November 9, 1948

Neale D. Murphy, Clerk
United States District Court
Providence, Rhode Island

*Re: United States v. Wallace & Tiernan Company,
Inc., et al. Civil Action No. 705*

Dear Mr. Murphy:

In regard to your telephone call of yesterday, November 8, 1948, concerning items 12, 15, 16, 17, 20 and 21 designated in the Government's praecipe served upon you in connection with the appeal in the above-entitled case, we are confronted with the following facts.

Item 12 is the transcript of the hearing held on May 3, 1948. I understand that this transcript was delivered by the court stenographer to Judge Hartigan and retained by him for his use in ruling upon the motions involved and through inadvertence was never filed by him with the Clerk. Technically, therefore, it was not a part of the record in your possession at the time of the service of the praecipe.

Items 15, 16, 17, 20 and 21 are civil subpoenas issued on May 11, 1948 against defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Novadel-Agene Corporation, and Industrial Appliance Corporation and served upon the defendants by the marshal for the District of New Jersey. I am informed by the marshal that he mailed his return of service to your office. However, I have been informed that your office has no record of ever having received such return. I have filed with you copies of the subpoenas and a certified copy of the marshal's docket showing receipt and service of the subpoenas together with an affidavit by Alfred Karstedt to the effect that the aforesaid copies were copies of the only subpoenas issued on that date against the aforesaid defendants in the above-entitled case. However, again it is true that technically those documents were not a part of the record in your possession at the time of the service of the praecipe.

623(b) In view of the fact that the praecipe must be complied with by you by Friday of this week, I have attempted to stipulate with the defense counsel to the effect that such items are a part of the record. In this I have been unsuccessful. Defense counsel have volunteered to waive the five day notice to which they would be entitled if the Government proceeded by motion to have the items made a part of the record. However, as all of our copies of the documents involved have been sent to Washington, such procedure is not available to us.

Accordingly, I wish to advise you that it is necessary for the Government to waive the inclusion of items 12, 15, 16, 17, 20 and 21 designated in the Government's praecipe. It is suggested that this letter be attached to the praecipe to explain your action in not certifying the above items as required by the praecipe.

Sincerely yours,

HERBERT A. BERGSON

Assistant Attorney General

By */s/* GERALD J. MCCARTHY

Chief, Boston Office

Antitrust Division

Copies to:

William H. Edwards of Edwards & Angell, Providence, Rhode Island, attorneys for Wallace & Tiernan Company, Inc.

Wallace & Tiernan Products, Inc.

Wallace & Tiernan Sales Corporation

Martin F. Tiernan

William J. Orchard

Gerald D. Peet

Harold S. Hutton

Vincent Pisani

Cornelius F. Schenck

Edward T. Hogan of Hogan & Hogan, Providence, Rhode Island, attorneys for Novadel-Agene Corporation

Industrial Appliance Corporation

S. Everett Wilkins, Jr. of Hinckley, Allen, Tillinghast & Wheeler, Providence, Rhode Island, attorneys for Builders Iron Foundry

Henry J. Chafee

624 *Additional Portions of Record Designated by Defendants*

In United States District Court

Criminal Action No. 6055 (15 U.S.C. §§ 1, 2)

Indictment—Filed Nov. 18, 1946

The Grand Jury charges:

FIRST COUNT

I. DEFENDANTS

1. The following named corporations are hereby indicted and made defendants herein. Each defendant corporation was organized in the year, exists under the laws of the State, has its principal place of business in the city, and will hereinafter be referred to by the designation, below set opposite its individual name:

Name	Year	State	Principal Office	Reference Designation
Wallace & Tiernan Company, Inc.	1913	New York	Belleville, New Jersey	W&T
Wallace & Tiernan Products, Inc.	1932	New Jersey	Belleville, New Jersey	W&T Products
Wallace & Tiernan Sales Corporation	1933	New Jersey	Belleville, New Jersey	W&T Sales
Builders Iron Foundry	1855	Rhode Island	Providence, Rhode Island	Builders
Novadel-Agene Corporation	1928	Delaware	Belleville, New Jersey	Novadel
Industrial Appliance Corporation	1930	Delaware	Belleville, New Jersey	Industrial
Fairbanks, Morse & Company		Illinois	Chicago, Ill.	Fairbanks
Hellige, Inc.		New York	Long Island City, New York	Hellige
Schaeff & Koerting Company		Pennsylvania	Philadelphia, Pennsylvania	Schaeff & Koerting

625 Defendant Martin F. Tiernan and one Charles F. Wallace, own or control 75% or more of the capital stock of defendants W&T and W&T Products. Defendants William J. Orchard and Gerald D. Peet own 70% of the capital stock of defendant W&T Sales. Defendant W&T controls defendant Novadel and owns 40% of its voting stock. Defendant Novadel owns all of the capital stock of defendant Industrial.

2. The individuals whose names and addresses are set forth below are hereby indicted and made defendants herein. Each of said individual defendants is associated with or employed by one or more of said corporate defendants and holds the official titles or positions shown below:

Name of Individual	Address	Position or Title	Defendants, Corporate, With Which is Associated
Martin F. Tiernan	Belleville, New Jersey	President, Treasurer and Director, President, Director	W&T Novadel
William J. Orchard	Belleville, New Jersey	General Manager	W&T, W&T Products, W&T Sales, Novadel and Industrial
		President, Director Treasurer, Sec'y and Director	W&T Products W&T Sales
		Vice-President and Treasurer	Novadel, Industrial
Henry S. Chafee	Providence, Rhode Island	President, Treas. and Director	Builders
Gerald D. Peet	Belleville, New Jersey	Chief Engineer	W&T, W&T Products, W&T Sales, Novadel and Industrial
		Secretary	Novadel
		Treasurer, Sec'y and Director	W&T Products
		President, Director	W&T Sales
Harold S. Hatton	Belleville, New Jersey	Sales Manager	W&T, W&T Products W&T Sales, Novadel and Industrial
Vincent Pisani	Belleville, New Jersey	Manager, Sanitary Sales	W&T, W&T Products and W&T Sales
Cornelius F. Schenck	Belleville, New Jersey	Director of Sales Engineering	W&T, W&T Products and W&T Sales
George C. Worthley	Chicago, Ill.	Manager Scale Div.	Fairbanks
P. A. E. Hellige	Long Island City, New York	President, Director	Hellige

626 Except defendant P. A. E. Hellige, each of said individual defendants will hereinafter be referred to by his last name.

3. Each of the individual defendants, within the applicable period of the Statute of Limitations, has been actively engaged in the management, direction and control of the affairs, policies and acts of the corporate defendant, or de-

fendants, with which he is associated, and within said period, has authorized, ordered or done some or all of the acts constituting the offenses hereinafter charged. The acts alleged in this indictment to have been done by a corporate defendant were authorized, ordered or done by the officers, directors and agents of that corporate defendant, including the officers, directors and agents thereof named as individual defendants herein.

II. NATURE OF TRADE AND COMMERCE INVOLVED

4. Chlorinating equipment consists of apparatus which utilizes and dispenses chlorine. Chlorine may be applied in several different forms: (a) as a gas, fed from cylinders or drums in which the gas is stored under pressure; (b) as a chemical compound, called hypochlorite, fed in solution from a pot or tank; or (c) as a dry chemical, fed from a hopper.

5. Chlorinating equipment is primarily of two different types dependent upon the form in which chlorine is to be applied. Gas chlorinating equipment is designed to utilize chlorine gas, either alone or mixed with other gases. The hypochlorinator is designed to utilize chlorine in the form of hypochlorite.

6. Chlorinating equipment is used primarily for the following purposes: (1) the treatment of water for consumption and use by human beings, including use in swimming pools; (2) the treatment of sewage; (3) the ageing and bleaching of wheat flour and other cereal products; (4) the prevention of bacterial spoilage of raw foods; (5) in industrial plants for slime control, water purification, bleaching of both paper and textiles, and sterilization.

627 7. W&T manufactures chlorinating equipment at its plant located at Belleville, New Jersey, and sells and ships said equipment directly, or through W&T Products-W&T Sales and Novadel, in interstate commerce to purchasers in other States of the United States, including the State of Rhode Island.

8. Gas chlorinating equipment is purchased and used by the Federal Government and by state, municipal and other local governments primarily for use in the purification of water and sewage. Except for some procurement contracts during wartime, purchases by governmental agencies of chlorinating equipment are made after soliciting public bids and are usually based on specifications issued by government purchasing agents. More than 90% of all gas chlorinating equipment sold or supplied in the United States for

the purpose of purification of water and sewage is manufactured by W&T and sold by W&T, W&T Products and W&T Sales.

9. Many sales of gas chlorinating equipment are made in connection with contracts for the installation of water purification systems. In these instances, only large filter and construction companies and general contractors are qualified to undertake the entire project, and necessarily become purchasers of chlorinating equipment therefor.

10. Gas chlorinating equipment is used by flour companies throughout the United States in the artificial ageing and bleaching of wheat flour. All gas chlorinating equipment used in the United States for the ageing and bleaching of flour is supplied to the millers by Novadel, W&T, W&T Products and W&T Sales. W&T manufactures all gas chlorinating equipment so supplied.

11. Gas chlorinating equipment is used in the raw food industry to control the decay of food. All gas chlorinating equipment used in the United States for this purpose is supplied to the raw food industry by W&T, W&T Products and W&T Sales. W&T manufactures all gas chlorinating equipment so supplied.

12. Gas chlorinating equipment is employed by paper and textile mills and by laundries to utilize chlorine as a bleach. It is also used in various industrial plants for the purpose of sterilization and of desliming boilers, condensers and other water equipment. More than 95% of gas chlorinating equipment used in the United States for industrial purposes is supplied by W&T, W&T Products and W&T Sales. W&T manufactures all gas chlorinating equipment so supplied.

13. At all times since 1917 more than 85% of the annual dollar value of all chlorinating equipment sold in the United States has consisted of gas chlorinating equipment.

14. More than 95% of all gas chlorinating equipment sold or supplied in the United States for all purposes is manufactured by W&T and sold by W&T, W&T Products, W&T Sales and Novadel. The only manufacturers of gas chlorinating equipment in the United States are Everson Manufacturing Company of Chicago, Illinois, and Chemical Equipment Company of Los Angeles, California.

15. Hypochlorinators are used for the treatment of relatively small amounts of water and sewage and to a limited extent compete with gas chlorinating equipment. Hypochlorinators are purchased primarily by the Federal Gov-

ernment and by state, municipal and other local governments in the same manner as is gas chlorinating equipment. Hypochlorinators are also purchased extensively by private concerns and individuals for the purification of water and sewage and for use in swimming pools.

16. Builders, at its plant in Providence, Rhode Island, is engaged in the production of water and sewage works equipment and control devices, including telemetering equipment and hypochlorinators. Proportioneers, Inc. (hereinafter referred to as Props) is a corporation, 70% of the stock of which is owned by Builders, organized and existing under the laws of the State of Rhode Island. Both Builders and its subsidiary, Props, sell chlorinating equipment manufactured by Builders in interstate commerce to purchasers in States of the United States other than the State of Rhode Island. More than 50% of all hypochlorinators manufactured and sold in the United States are manufactured and sold by Builders and by Props. More than 25% of all hypochlorinators manufactured and sold in the United States are manufactured and sold by W&T and W&T Sales.

17. The total sales of chlorinating equipment for use in the sanitary field only by W&T, W&T Sales and W&T Products for the year 1944 were in excess of \$14,000,000. The total sales of chlorinating equipment by Builders and by Props in the year 1944 were in excess of \$390,000. The total sales of all other manufacturers of chlorinating equipment in the United States for all purposes for the year 1944 were less than \$450,000.

18. Fairbanks is engaged in part in the manufacture, at its plants in St. Johnsbury, Vermont, Moline, Illinois, and elsewhere, of weighing equipment, including platform scales used for the purpose of weighing and recording weights of cylinders filled with liquid chlorine. Fairbank ships such weighing equipment from its plants in Vermont and Illinois in interstate commerce to purchasers in other States of the United States including the State of Rhode Island. A platform scale is essential in the use of gas chlorinating equipment to indicate the amount of chlorine on hand at any particular time and to enable the calculation of the rate of consumption thereof. From 1931 to the date of the presentment of this indictment in excess of 75% of the specifications issued in connection with the purchase of gas chlorinating equipment for the chlorination of water and sewage have required the furnishing of said platform scales used for said purpose.

19. Hellige, Inc. is engaged in part in the manufacture of chlorine comparators. It manufactures said equipment at its plant in Long Island City, New York, and sells and ships said equipment in interstate commerce to purchasers in other States of the United States, including the State of Rhode Island. A comparator is essential in the use of chlorinating equipment and is a device for determining the amount of chlorine present in a liquid, and the hydrogen ion concentration of the liquid (commonly designated as the "pH"). From 1931 to the date of the presentment of this indictment, more than 75% of the specifications issued in connection with the purchase of chlorinating equipment for the chlorination of water and sewage have required the furnishing of a Hellige comparator.

20. Schutte-Koerting is engaged in part in the manufacture of rotameters. It manufactures said equipment at its plant in Philadelphia, Pennsylvania, and sells and ships said equipment in interstate commerce to purchasers in States of The United States, other than the State of Pennsylvania. A meter to indicate the rate of flow of chlorine gas is essential to the manufacture and operation of gas chlorinating equipment. A rotameter is a type of meter which is used on certain gas chlorinating equipment manufactured by others than defendants which competes with the gas chlorinating equipment manufactured by W&T.

III. THE COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE

21. Beginning in or about the year 1917, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentment of this indictment, W&T, Tiernan and Builders, and other persons to the Grand Jurors unknown, knowingly engaged, in part within the District of Rhode Island, in a combination and conspiracy in restraint of the aforesaid trade and commerce among the several States in chlorinating equipment in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" as amended (15 U.S.C., Sec. 1) commonly known as the Sherman Act.

22. At various times, and from time to time between 1917 and the date of the presentment of this indictment, the exact dates being to the Grand Jurors unknown, the other defendants joined the said combination

and conspiracy and became parties thereto and continued to engage and participate therein at all times thereafter up to and including the date of the presentment of this indictment.

23. The combination and conspiracy herein charged has consisted of a continuing agreement and concert of action among the defendants and others to the Grand Jurors unknown, the terms of which have been substantially that the defendants exclude others from the manufacture and distribution of chlorinating equipment and eliminate competition among themselves, in the manufacture and distribution of chlorinating equipment by:

(a) Acquiring by purchase, from persons other than their own employees, patents and exclusive rights under patents, covering inventions relating to chlorinating equipment;

(b) Instituting and threatening to institute suits for alleged infringement of said patents;

(c) Inducing competitors to agree not to engage in the manufacture and distribution of chlorinating equipment;

(d) Acquiring the capital stock or business assets of competitors;

(e) Refusing to furnish supplies, including flour ageing and bleaching agents, and services used in connection with chlorinating equipment, except on the condition that the chlorinating equipment be obtained from the defendants;

(f) Inducing others not to sell various parts, devices and appliances required for the manufacture, sale or operation of chlorinating equipment to any one save the defendants;

(g) Dividing the field for distribution of gas chlorinating equipment by agreeing that certain of the defendants would not manufacture or sell chlorinating equipment having a capacity in excess of 1,500,000 gallons of water per day;

(h) Entering into agreements with large filter and construction companies and general contractors of the type referred to in paragraph 9 of this indictment under the terms of which said companies and contractors agree to distribute only defendants' chlorinating equipment;

(i) Entering into agreements with the companies and contractors referred to in subparagraph (h) above, fixing the prices, terms and conditions upon which said companies and contractors are required to offer for resale chlorinating equipment manufactured by defendants;

(j) Including sanitary engineers, consulting engineers, contractors and others to the Grand Jurors unknown, who are employed by purchasers (including federal, state and local government agencies) for the purpose of preparing specifications for chlorinating equipment and determining whether individual bids comply with such specifications, to join and engage in said combination and conspiracy by:

(i) causing invitations to bid for contracts to be issued only to defendants;

(ii) preparing for issuance plans and specifications which restrain others from bidding;

(iii) preparing plans and specifications for issuance which disqualify or discourage all bidders except defendants;

(iv) causing the rejection of bids which offer for sale chlorinating equipment not manufactured by defendants; and

(v) causing the rejection of all bids and the issuance of new invitations to bid for the purpose of enabling the defendants to underbid the low bidder.

(k) Using defendants' position in the manufacture and distribution of chlorinating equipment to have or attempt to have:

(i) invitations to bid for contracts for said equipment issued only to defendants;

(ii) plans and specifications prepared and issued for said equipment that restrain others from bidding;

(iii) plans and specifications issued which disqualify or discourage all bidders except the defendants;

(iv) all bids rejected and new invitations to bid issued for the purpose of enabling the defendants or any one of them to underbid the low bidder.

(l) Cutting prices on chlorinating equipment, with the intention and purpose of eliminating competition;

(m) Circulating false rumors and unfair reports derogatory to other manufacturers of chlorinating equipment;

(n) Spying upon other manufacturers of chlorinating equipment and thereby obtaining confidential information from their files;

(o) Enticing the contractors and companies referred to in paragraph 9 of this indictment to submit complementary or dummy bids in ostensible but not intended competition with bids submitted by one or more of the defendants, in order to provide color of compliance with laws or regulations requiring competitive bidding;

(1) Furnishing chlorinating equipment to prospective purchasers without cost for the purpose of preventing the sale of competitive chlorinating equipment and driving competitors out of business.

24. During the period of time covered by this indictment and for the purpose of accomplishing the offense hereinbefore charged, the defendants, by concerted action, have done those things hereinbefore alleged, including the acts and things described in the following paragraphs.

A. Acquisition of Patent and Competitors Serving the Sanitary Field

25. On or about November 20, 1917, W&T acquired from Electro Bleaching Gas Co. (hereinafter sometimes referred to as Electro), then in competition with W&T in the manufacture and sale of chlorinating equipment (a) an exclusive license to use and sell under the Ornstein patents Nos. 1,142,361 and 1,233,371 covering inventions relating to chlorinating equipment, (b) the chlorinating equipment business of Electro, including all manufacturing and sales data pertaining thereto, (c) an agreement by Electro and its officers and directors to refrain from engaging thereafter in the chlorinating equipment business, and, (d) an assignment of Electro's exclusive license from Builders under the Gregory patents Nos. 868,776 and 857,343. Builders approved the assignment by Electro of the exclusive license under the said Gregory patents. Thereafter, commencing in 1919 W&T instituted at least eight suits for infringement of said patent No. 1,142,361. In one of those suits the patent was held not to have been infringed; in the others the patent was held valid and infringed.

26. In 1917, W&T acquired from one Major Carl R. Darnall the assignment of United States Letters Patent No. 1,007,647 covering an invention relating to chlorinating equipment. Thereafter W&T instituted suit against The Village of Leroy, New York, for infringement of said patent No. 1,007,647. The Court held the patent valid and infringed.

27. On or about July 13, 1936 W&T acquired from one George Ornstein an exclusive license under United States Letters Patent Nos. 1,944,803 and 1,944,804 covering inventions relating to chlorinating equipment. Said license is still in full force and effect.

28. On or about April 13, 1937, W&T acquired from Dr. Richard Pomeroy and Arthur P. Banta United States Let-

ters Patent No. 2,076,964 covering an invention relating to chlorinating equipment. Thereafter W&T and W&T Sales induced others to have specifications issued for chlorinating equipment specifying the invention covered by said patent.

29. On or about December 3, 1936, W&T acquired, from one H. J. Darcey, an exclusive license under United States Letters Patent No. 2,034,460 covering an invention relating to chlorinating equipment. Said license is for the life of the patent and is still in full force and effect. Thereafter

W&T and W&T Sales induced others to have specifications issued for chlorinating equipment specifying the invention covered by said patent.

30. On or about July 30, 1940, in order to intimidate prospective purchasers of chlorinating equipment not manufactured by the defendants, W&T instituted a patent-infringement suit against the Borough of Ephrata, Pennsylvania, and one John Lewis, a contractor, for alleged patent infringement by reason of the installation of gas chlorinating equipment manufactured by the Everson Manufacturing Company, Chicago, Illinois. The case was dismissed by the Court on November 21, 1945, for want of prosecution.

31. In 1930, W&T bought the assets of the Paragon Company, then in competition with W&T in the manufacture and distribution of chlorinating equipment, and at various times after July 30, 1940, attempted to purchase the assets of the Everson Manufacturing Company.

32. On or about May 1, 1940, in consideration of the payment of \$68,250 to Howard J. Pardee by Orchard, and a promise by said Orchard to cause the employment of said Pardee by W&T, at an annual salary of \$7,500, said Pardee caused the assets of the Pardee Engineering Company, then in competition with W&T in the manufacture and distribution of chlorinating equipment, to be transferred to Orchard. At all times since May 1, 1940, to the date of the presentment of this indictment, said Pardee has been in the employ of W&T.

33. On November 4, 1935, W&T paid R. W. Sparling, then in competition with W&T in the manufacture and distribution of chlorinating equipment, \$5,000 cash and agreed to pay \$10,000 per year thereafter for 17 years for which Sparling granted to W&T an exclusive license to all proprietary and inventive rights in the Sparling chlorinator. Sparling agreed that neither he nor his son would engage in the chlorinating equipment business during the life of said agreement. Said agreement is still in full force and effect.

636 B. *Acquisition of Patents and Competitors
Serving the Flour-Milling Field
and the Organization of
W&T Sales*

34. Prior to the year 1928 W&T licensed flour millers to use the patented Agene Process for the ageing and bleaching of flour, and supplied said millers the chlorinating equipment with which to practice said process. Prior to 1928 the Novadel Process Company licensed flour millers to use the Novadel Process, and "Novadelox" covered by United States Letters Patent No. 1,539,701, a product for the bleaching of flour which competed with W&T's Agene Process. On September 15, 1928, W&T, W&T Products, Tjerman, Orchard, Peet and others to the Grand Jurors unknown, caused a new corporation to be formed under the name of Novadel-Agene Corporation, which is the defendant Novadel, and caused to be transferred to it, among various assets, W&T's rights under the Agene Process in consideration of the issue to W&T of approximately 40% of the voting stock of said Novadel and the exclusive rights hereinafter described. As a part of the same transaction, said Novadel Process Company transferred to said Novadel, along with other assets, its rights, including patent rights, to "Novadelox" and the Novadel Process, and said W&T entered into a contract with Novadel under the terms of which W&T was given (a) the exclusive right to manufacture all mechanical equipment, including chlorinating equipment required for the practice of any and all of the processes, including patented processes, owned by Novadel, and (b) the exclusive agency for the distribution of Novadel's said processes and products.

35. Beginning in or about September 1928, Novadel, W&T and W&T Products marketed the processes and products of Novadel and W&T designed to serve the flour-milling industry throughout the United States under uniform contracts which while varying from time to time in their formal aspects, required the users of said processes (a) to lease or buy equipment manufactured by W&T, (b) to use in said equipment and in working the said processes only the material furnished by Novadel, and (c) to obtain the necessary supplies and services required in connection with the use of said equipment and said processes from W&T, W&T Products, Novadel and Industrial. On or about April 28, 1942, Novadel entered into new standard form contracts with certain flour millers under the

terms of which said flour millers agreed to use the services, chlorinating equipment and maturing agents supplied by Novadel for the ageing and bleaching of all the flour in all the mills of each of said millers. At no time since 1928 have defendants supplied ageing and bleaching materials to purchasers unless said purchasers used chlorinating equipment manufactured by W&T.

36. Sometime prior to the year 1930, one John Logan of Chicago, Illinois, began to produce a chlorine compound called "Beta Chloro" for maturing flour which competed with Novadel's processes and "Novadelox", and said Logan organized the Industrial Appliance Corporation under the laws of Illinois for the production and marketing thereof. In August 1930 Novadel caused Industrial to be organized under the laws of Delaware and acquired all of its capital stock. Thereupon Novadel caused Industrial to acquire all of the assets of Industrial Appliance Corporation of Illinois in order to eliminate from the market a flour bleaching and maturing agent which could be used without the use of W&T chlorinating equipment. On August 27, 1930, Industrial entered into a contract with W&T under the terms of which W&T was constituted the exclusive agent of Industrial for the sale, installation, servicing and distribution of all apparatus, equipment including chlorinating equipment, and materials then in use, or hereafter to be used, in Industrial's business in the United States and Canada.

37. In 1933, Orchard, Peet and others to the Grand Jurors unknown, caused W&T Sales to be organized under the laws of New Jersey for the purpose of transacting the business of W&T in certain states, principally on

638 the West Coast of the United States. Thereafter W&T Sales entered into contracts with W&T, W&T Products, Novadel and Industrial, by the terms of which W&T Sales was constituted the exclusive agent of said defendants in certain states in the United States for the sale and distribution of products manufactured by the said defendants. Each of said contracts fixed the price at which W&T Sales was to offer said products for sale.

38. In 1949 one Frederick H. Penn was conducting a business under the trade name and style of "Superlite Company" and, under patent No. 2,208,471, was manufacturing a benzoyl peroxide bleaching compound known as "Superlite" for the bleaching of flour. "Superlite" was competitive with "Novadelox", the Agenic Process and "Beta Chloro". On August 16, 1948, Novadel filed a suit

for alleged patent infringement against said Penn. In his answer to said suit Penn alleged that Novadel had improperly used said patents to create a monopoly in an unpatented article. In or about December 1941, in order to avoid a trial on the merits of the defense of said Penn and to eliminate from the market a flour bleaching and maturing agent which could be used without the use of W&T chlorinating equipment, Novadel acquired the assets, including patents, under which Penn was conducting business as the Superlite Company.

C. Preemption of Sources of Supply of Parts for Chlorinating Equipment

39. On or about July 28, 1931, W&T entered into a contract with Hellige by the terms of which defendant W&T was given the exclusive sales agency, within the United States and Canada, for the sale of Hellige comparators in the price range below \$37 in the sanitary field. W&T agreed to refrain from the sale of comparators in the price range above \$37, within the United States and Canada, in the sanitary field, and Hellige agreed to refrain from selling comparators in the price range below \$37, within the United States and Canada, in the sanitary field. On April 15, 1941, because of fear of prosecution for violation of the federal antitrust laws, Hellige gave notice of cancellation of said written contract, but thereafter for a period of 16 months the parties agreed to continue to act, and did act, as if it were in full force and effect.

40. In or about the year 1931, W&T entered into an agreement with Fairbanks by the terms of which Fairbanks agreed to sell scales for use with chlorinating equipment to W&T exclusively. Said agreement is still in full force and effect, and Fairbanks has refused to sell said scales to competitors of defendants.

41. In or about the year 1931, W&T entered into an agreement with Schutte-Koerting by the terms of which Schutte-Koerting agreed to sell its rotameters for use in the sanitary field to W&T exclusively. Said agreement is still in full force and effect, and Schutte-Koerting has refused to sell said rotameters to competitors of defendants.

D. Dividing the Field Among the Defendants For Distribution of Chlorinating Equipment

42. In 1935, W&T and Builders were in competition with each other in the manufacture and sale of chlorinating

equipment and in the development, manufacture and sale of telemetering equipment. In 1935, the exact date being to the Grand Jurors unknown Builders and Chafee entered into an agreement with W&T and W&T Products by the terms of which W&T and W&T Products agreed to refrain from the manufacture and sale of telemetering equipment for use in the industrial field, as distinguished from the sanitary field, and Builders and Chafee agreed to limit the sales of Props chlorinating equipment to installations involving the purification of less than 1,500,000 gallons of water per day. The parties agreed also to cooperate and work together for the best interests of both. Said agreement is still in full force and effect. Thereafter, applications for United States Letters Patent covering inventions relating to the process of telemetering having been acquired by W&T from C. F. Wallace (Serial No. 588,595) and by Builders from George T. Huxford (Serial No. 621,211), W&T, W&T Products and Orchard, on April 21, 1935, pursuant to the aforesaid agreement of 1935, entered into license agreements with Builders by the terms of which Builders acquired an exclusive license under said Wallace application and any patent thereafter issued upon said application, and W&T Products acquired a non-exclusive license limited to the sanitary field and desludging under said Huxford application and any patent thereafter issued thereon and under eleven additional patents owned by Builders. Said cross license is still in full force and effect.

F. *Preemption of Sales Outlets for Chlorinating Equipment*

43. Commencing in or about the year 1925, and continuing until the date of the presentment of this indictment, W&T, W&T Products and W&T Sales have entered into contracts with more than 150 large filter companies, construction companies, and general contractors. Said companies and contractors constitute the most important sales outlets for chlorinating equipment in the sanitary field. In said agreements said companies and contractors agreed to purchase and resell the chlorinating equipment of W&T exclusively, at the prices and on the terms and conditions fixed by W&T, W&T Products, and W&T Sales.

IV. EFFECTS.

44. The combination and conspiracy heretofore alleged has had many effects, among which are the following:

- (a) free and vigorous competition in the production and distribution of chlorinating equipment in interstate commerce in the United States has been prevented and restrained;
- (b) arbitrary, artificial, unreasonable, excessive and noncompetitive prices have been exacted from purchasers of chlorinating equipment, including the United States Government;
- (c) development and improvement of chlorinating equipment has been impeded and retarded;
- (d) a substantial number of persons have been excluded from the chlorinating equipment industry and others have been restricted in their opportunity to engage in said industry.

V. JURISDICTION AND VENUE.

45. The combination and conspiracy, heretofore alleged, has operated and has been carried out, in part, within the District of Rhode Island. The defendants, within the applicable period of the statute of limitations, in effectuating and carrying out said combination and conspiracy, have, within said District, performed many acts among which are the following:

(a) Builders owns, maintains and operates factories and sales offices in the District of Rhode Island from which it sells and ships substantial quantities of chlorinating equipment in interstate commerce.

(b) W&T sells and ships chlorinating equipment, in interstate commerce into the District of Rhode Island, buys various types of equipment from Builders within said District and ships the same out of Rhode Island in interstate commerce, and within the District of Rhode Island has induced purchasers to issue specifications written in such form that only defendants could comply therewith.

(c) W&T, W&T Products, Tiernan, Orchard, Builders and Chafee, within the District of Rhode Island, negotiated and entered into the agreements described and alleged in paragraph 42 of this indictment.

(d) Builders and Chafee within the District of Rhode Island, performed and carried out the terms of said agreements described and alleged in paragraph 42 of this indictment.

SECOND COUNT

46. The Grand Jury realleges all of the allegations contained in paragraph 1 through paragraph 20 of the first count of this indictment.

47. Beginning in or about the year 1917, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentment of this indictment, W. T. Tiernan, Builders, and other persons to the Grand Jurors unknown, knowingly engaged, in part within the District of Rhode Island, in a combination and conspiracy to monopolize the aforesaid trade and commerce among the several States in chlorinating equipment in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended (15 U. S. C., Section 2), commonly known as the Sherman Act.

48. The Grand Jury realleges all of the allegations contained in paragraph 22 through paragraph 45 of the first count of this indictment.

THIRD COUNT

49. The following named corporations are hereby indicted and made defendants in this count. Each defendant corporation was organized in the year, exists under the laws of the State, has its principal place of business in the city, and will hereinafter be referred to by the designation, below set opposite its individual names:

Name	Year	State	Principal Office	Designation
Wallace & Tiernan Company, Inc.	1913	New York	Belleville, New Jersey	W&T
Wallace & Tiernan Products, Inc.	1923	New Jersey	Belleville, New Jersey	W&T Products
Wallace & Tiernan Sales Corporation	1933	New Jersey	Belleville, New Jersey	W&T Sales
Norwalk Assets Corporation	1928	Delaware	Belleville, New Jersey	Norwalk
Industrial Equipment Corporation	1930	Delaware	Belleville, New Jersey	Industrial

Defendant Martin F. Tiernan and one Charles F. Wallace, own or control 75% or more of the capital stock of defendant W&T and W&T Products. Defendant William J. Orchard and Gerald D. Post own 70% of the capital stock of defendant W&T Sales. Defendant W&T controls

defendant Novadel and owns 40% of its voting stock. Defendant Novadel owns all of the stock of defendant Industrial.

50. The individuals whose names and addresses are set forth below are hereby indicted and made defendants in this count. Each of said individual defendants is associated with or employed by one or more of said corporate defendants and holds the official titles or positions shown below.

Defendant Corporation

Mean Which

Is an Officer

<i>Name of Individual</i>	<i>Address</i>	<i>Business Title</i>	<i>Mean Which</i>
Martin J. Tarran	Belleville, New Jersey	President, Treasurer	W&T and Industrial
		President, Director	Novadel
William J. Orchard	Belleville, New Jersey	General Manager	W&T, W&T Products, W&T Sales, Novadel and Industrial
		President, Director	W&T Products
		Treasurer, Secretary and Director	W&T Sales
		Vice-President and Treasurer	Novadel Industrial
Gerald D. Peck	Belleville, New Jersey	Chief Engineer	W&T, W&T Products, W&T Sales, Novadel and Industrial
		Treasurer, Secretary and Director	W&T Products
		President, Director	W&T Sales, Novadel
		Secretary	Novadel
Frank J. Thompson	Belleville, New Jersey	Sales Manager	W&T, W&T Products, W&T Sales, Novadel and Industrial
Robert Brown	Belleville, New Jersey	Manager, Sanitary Sales	W&T, W&T Products and W&T Sales
William F. Schenck	Belleville, New Jersey	Director and Sales Engineering	W&T, W&T Products and W&T Sales

Each individual defendant will hereinafter be referred to by his last name.

51. Builders Iron Foundry, sometimes in this count referred to as Builders, is a corporation organized and existing under and by virtue of the laws of the State of Rhode Island having its principal place of business at Providence, Rhode Island. Henry S. Chafee, sometimes in this count referred to as Chafee, is, and has been President, Treasurer and Director of Builders.

52. Hellige, Inc., sometimes in this count referred to as Hellige, is a corporation organized and existing under and by virtue of the laws of the State of New York having its original place of business at Long Island City, New York.

53. Schutte & Koerting Company, sometimes in this count referred to as Schutte-Koerting, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania having its principal place of business at Philadelphia, Pennsylvania.

54. Fairbanks, Morse & Company, sometimes in this count referred to as Fairbanks, is a corporation organized and existing under and by virtue of the laws of the State of Illinois having its principal place of business at Chicago, Illinois.

55. The Grand Jury realleges all of the allegations contained in paragraph 3 through paragraph 20 of the first count of this indictment.

56. Beginning in or about the year of 1917, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentment of this indictment, W&T, Tiernan, and other 645 persons to the Grand Jurors unknown, knowingly engaged, in part within the District of Rhode Island, in an attempt to monopolize the aforesaid trade and commerce in gas chlorinating equipment in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" as amended (15 U. S. C., Section 2), commonly known as the Sherman Act.

57. At various times, and from time to time between 1917 and the date of the presentment of this indictment, the exact date being to the Grand Jurors unknown, the other defendants joined in the attempt to monopolize and became parties thereto and continued to engage and participate therein at all times thereafter up to and including the date of the presentment of this indictment.

58. The offense herein charged has been carried out by means of a continuing agreement and concert of action among the defendants and others to the Grand Jurors unknown, the terms of which have been substantially that the defendants exclude others from the manufacture and distribution of gas chlorinating equipment and eliminate competition among themselves in the manufacture and distribution of gas chlorinating equipment by

(a) Acquiring by purchase, from persons other than their own employees, patents and exclusive rights under patents, covering inventions relating to chlorinating equipment;

(b) Instituting and threatening to institute suits for alleged infringement of said patents;

(c) Inducing competitors to agree not to engage in the manufacture and distribution of chlorinating equipment;

(d) Acquiring the capital stock or business assets of competitors;

(e) Refusing to furnish supplies, including flour, ageing and bleaching agents, and services used in connection with chlorinating equipment except on the condition that the chlorinating equipment be obtained from the defendants;

(f) Inducing others not to sell various parts, devices and appliances required for the manufacture, sale or operation of chlorinating equipment to anyone save the defendants;

(g) Dividing the field for distribution of gas chlorinating equipment by agreeing that certain of the defendants would not manufacture or sell chlorinating equipment having a capacity in excess of 1,500,000 gallons of water per day;

(h) Entering into agreements with large filter and construction companies and general contractors of the type referred to in paragraph 9 of this indictment under the terms of which said companies and contractors agree to distribute only defendants' chlorinating equipment;

(i) Entering into agreements with the companies and contractors referred to in subparagraph (h) above, fixing the prices, terms and conditions upon which said companies and contractors are required to offer for resale chlorinating equipment manufactured by defendants;

(j) Inducing sanitary engineers, consulting engineers, contractors and others, employed by purchasers (including federal, state and local government agencies) for the purpose of preparing specifications for chlorinating equipment and determining whether individual bids comply with such specifications, to join and engage in the offenses herein charged by:

(i) causing invitations to bid for contracts to be issued only to defendants;

(ii) preparing for issuance plans and specifications which restrain others from bidding;

(iii) preparing plans and specifications for issuance which disqualify or discourage all bidders except defendants;

(iv) causing the rejection of bids which offer for sale chlorinating equipment not manufactured by defendants; and

647 (v) causing the rejection of all bids and the issuance of new invitations to bid for the purpose of enabling the defendants to underbid the low bidder.

(k). Using defendants' position in the manufacture and distribution of chlorinating equipment to have or attempt to have:

(i) invitations to bid for contracts for said equipment issued only to defendants;

(ii) plans and specifications prepared and issued for said equipment that restrain others from bidding;

(iii) plans and specifications issued which disqualify or discourage all bidders except the defendants;

(iv) all bids rejected and new invitations to bid issued for the purpose of enabling the defendants or any one of them to underbid the low bidder.

(l) Cutting prices on chlorinating equipment, with the intention and purpose of eliminating competition;

(m) Circulating false rumors and unfair reports derogatory to other manufacturers of chlorinating equipment;

(n) Spying upon other manufacturers of chlorinating equipment and thereby obtaining confidential information from their files;

(o) Inducing the contractors and companies referred to in paragraph 9 of this indictment to submit complementary or dummy bids in ostensible but not intended competition with bids submitted by one or more of the defendants, in order to provide color of compliance with laws or regulations requiring competitive bidding;

(p) Furnishing chlorinating equipment to prospective purchasers without cost for the purpose of preventing the sale of competitive chlorinating equipment and driving competitors out of business.

648 59. The Grand Jury realleges all of the allegations contained in paragraph 24 through paragraph 43 of the first count of this indictment.

60. The unlawful attempt to monopolize hereinbefore alleged has had the effects among others, set forth in paragraph 44, subdivision (a) through subdivision (c), of the first count of this indictment, said subdivisions of said

paragraph being here realleged with the same force and effect as though here set forth in full.

61. The unlawful attempt to monopolize hereinbefore alleged has operated and has been carried on, in part, within the District of Rhode Island. The defendants, within the applicable period of the statute of limitations, in furtherance of said unlawful attempt to monopolize, have, within said District, performed, among others, the acts described in paragraph 45, subdivisions (b) and (c), of the first count of this indictment, said subdivisions of said paragraph being here realleged with the same force and effect as though here set forth in full.

FOURTH COUNT

62. The Grand Jury realleges all of the allegations contained in paragraph 49 through paragraph 55 of the third count of this indictment.

63. Beginning in or about the year 1917, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentment of this indictment, W & T, Tiernan, and other persons to the Grand Jurors unknown, have knowingly monopolized, in part within the District of Rhode Island, the aforesaid trade and commerce among the several States in gas chlorinating equipment in violation of Section 2 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and 'monopolies'" as amended (15 U. S. C., Section 2), commonly known as the Sherman Act.

64. At various times, and from time to time between 1917 and the date of the presentment of this indictment, the exact date being to the Grand Jurors unknown, the other defendants joined in the unlawful monopolization and became parties thereto and continued to engage and participate therein at all times thereafter up to and including the date of the presentment of this indictment.

65. The Grand Jury realleges all of the allegations contained in paragraph 58 of the third count of this indictment.

66. The Grand Jury realleges all of the allegations contained in paragraph 24 through paragraph 43 of the first count of this indictment.

67. The unlawful monopoly hereinbefore alleged has had the effects, among others, set forth in paragraph 44, sub-

divisions (a) through (e) of the first count of this indictment, said subdivisions of said paragraph being here realleged with the same force and effect as though here set forth in full.

68. The unlawful monopoly heretofore alleged has operated and has been carried out, in part, within the District of Rhode Island. The defendants, within the applicable period of the statute of limitations, in furtherance of said unlawful monopolization, have, within said District performed, among others, the acts described in paragraph 45, subdivisions (b) and (c) of the first count of this indictment, said subdivisions of said paragraph being here realleged with the same force and effect as though here set forth in full.

650 A TRUE BILL:

HERBERT N. DAY: /s/
Foreman.

CHALMERS HAMILL: /s/
Special Assistant to the Attorney General.

ALFRED KARSTED: /s/
KENZIE K. KIRKMAN: /s/
Special Attorneys.

WENDELL BERGE: /s/
Assistant Attorney General.

GEORGE F. TROY: /s/
United States Attorney.

651 In United States District Court

Criminal Action

No. 6070

(15 U. S. C. §§ 1, 2)

Information—Filed May 1, 1947

The United States of America, acting through Tom C. Clark, Attorney General, Wendell Berge, Assistant Attorney General, George F. Troy, United States Attorney, Grant W. Kelleher and Chalmers Hamill, Special Assistants to the Attorney General, and Alfred Karsted and Kenzie K. Kirkham, Special Attorneys, charges:

FIRST COUNT

I. DEFENDANTS

1. The following named corporations are hereby made defendants herein. Each defendant corporation was organized in the year, exists under the laws of the State, has its principal place of business in the city, and will hereinafter be referred to by the designation, below set opposite its individual name:

Name	Year	State	Principal Office	Designation
Wallace & Tiernan Company, Inc.	1913	New York	Belleville, New Jersey	W&T
Wallace & Tiernan Products, Inc.	1932	New Jersey	Belleville, New Jersey	W&T Products
Wallace & Tiernan Sales Corporation	1933	New Jersey	Belleville, New Jersey	W&T Sales
652				
Builders Iron Foundry	1853	Rhode Island	Providence, Rhode Island	Builders
Novadel-Agene Corporation	1928	Delaware	Belleville, New Jersey	Novadel
Industrial Appliance Corporation	1930	Delaware	Belleville, New Jersey	Industrial
Fairbanks, Morse & Company		Illinois	Chicago, Ill.	Fairbanks
Hellige, Inc.		New York	Long Island City, New York	Hellige
Schutte & Koerting Company		Pennsylvania	Philadelphia, Pennsylvania	Schutte-Koerting

Defendant Martin F. Tiernan and one Charles F. Wallace, own or control 75% of more of the capital stock of defendants W&T and W&T Products. Defendants William J. Orelard and Gerald D. Peet own 70% of the capital stock of defendant W&T Sales. Defendant W&T controls defendant Novadel and owns 40% of its voting stock. Defendant Novadel owns all of the capital stock of defendant Industrial.

2. The individuals whose names and addresses are set forth below are hereby made defendants herein. Each of said individual defendants is associated with or employed by one or more of said corporate defendants and holds the official titles or positions shown below:

the officers, directors and agents of that corporate defendant, including the officers, directors and agents thereof named as individual defendants herein.

II. NATURE OF TRADE AND COMMERCE INVOLVED

4. Chlorinating equipment consists of apparatus which utilizes and dispenses chlorine. Chlorine may be applied in several different forms: (a) as a gas, fed from cylinders or drums in which the gas is stored under pressure; (b) as a chemical compound, called hypochlorite, fed in solution from a pot or tank; or (c) as a dry chemical, fed from a hopper.

654 5. Chlorinating equipment is primarily of two different types dependent upon the form in which chlorine is to be applied. Gas chlorinating equipment is designed to utilize chlorine gas, either alone or mixed with other gases. The hypochlorinator is designed to utilize chlorine in the form of hypochlorite.

6. Chlorinating equipment is used primarily for the following purposes: (1) the treatment of water for consumption and use by human beings, including use in swimming pools; (2) the treatment of sewage; (3) the ageing and bleaching of wheat flour and other cereal products; (4) the prevention of bacterial spoilage of raw foods; (5) in industrial plants for smoke control, water purification, bleaching of both paper and textiles, and sterilization.

7. W&T manufactures chlorinating equipment at its plants located at Belleville, New Jersey, and sells and ships said equipment directly, or through W&T Products, W&T Sales and ~~New York~~ ^{Philadelphia} into commerce to purchasers in other States of the United States, including the State of Rhode Island.

8. Gas-chlorinating equipment is purchased and used by the Federal Government and by state, municipal and other local governments primarily for use in the purification of water and sewage. Except for some procurement contracts during wartime, purchases by governmental agencies of chlorinating equipment are made after soliciting public bids and are usually based on specifications issued by government purchasing agents. More than 90% of all gas chlorinating equipment sold or supplied in the United States for the purpose of purification of water and sewage is manufactured by W&T and sold by W&T, W&T Products and W&T Sales.

9. Many sales of gas-chlorinating equipment are made in connection with contracts for the installation of water

655 purification systems. In these instances, only large filter and construction companies and general contractors are qualified to undertake the entire project and necessarily become purchasers of chlorinating equipment therefor.

10. Gas chlorinating equipment is used by flour companies throughout the United States in the artificial aging and bleaching of wheat flour. All gas chlorinating equipment used in the United States for the aging and bleaching of flour is supplied to the millers by Novadel, W&T, W&T Products and W&T Sales. W&T manufactures all gas chlorinating equipment so supplied.

11. Gas chlorinating equipment is used in the raw food industry to control the decay of food. All gas chlorinating equipment used in the United States for this purpose is supplied to the raw food industry by W&T, W&T Products and W&T Sales. W&T manufactures all gas chlorinating equipment so supplied.

12. Gas chlorinating equipment is employed by paper and textile mills and by laundries to utilize chlorine as a bleach. It is also used in various industrial plants for the purpose of sterilization and of descaling boilers, condensers and other water equipment. More than 95% of gas chlorinating equipment used in the United States for industrial purposes is supplied by W&T, W&T Products and W&T Sales. W&T manufactures all gas chlorinating equipment so supplied.

13. At all times since 1917 more than 85% of the annual dollar value of all chlorinating equipment sold in the United States has consisted of gas chlorinating equipment.

14. More than 95% of all gas chlorinating equipment sold or supplied in the United States for all purposes is manufactured by W&T and sold by W&T, W&T Products, W&T Sales and Novadel. The only other manufacturers of gas chlorinating equipment in the United States are Everson Manufacturing Company of Chicago, Illinois, and Chemical Equipment Company of Los Angeles, California.

656 15. Hypochlorinators are used for the treatment of relatively small amounts of water and sewage and to a limited extent compete with gas chlorinating equipment. Hypochlorinators are purchased primarily by the Federal Government and by state, municipal and other local governments in the same manner as is gas chlorinating equipment. Hypochlorinators are also purchased extensively by private concerns and individuals for the purification of water and sewage and for use in swimming pools.

16. Builders, at its plant in Providence, Rhode Island, is engaged in the production of water and sewage works equipment and control devices, including telemetering equipment and hypochlorinators. Proportioners, Inc. (hereinafter referred to as Props) is a corporation, 90% of the stock of which is owned by Builders, organized and existing under the laws of the State of Rhode Island. Both Builders and its subsidiary, Props, sell chlorinating equipment manufactured by Builders in interstate commerce to purchasers in States of the United States other than the State of Rhode Island. More than 50% of all hypochlorinators manufactured and sold in the United States are manufactured and sold by Builders and by Props. More than 25% of all hypochlorinators manufactured and sold in the United States are manufactured and sold by W&T and W&T Sales.

17. The total sales of chlorinating equipment for use in the sanitary field only, by W&T, W&T Sales and W&T Products for the year 1944 were in excess of \$14,000,000. The total sales of chlorinating equipment by Builders and by Props in the year 1944 were in excess of \$300,000. The total sales of all other manufacturers of chlorinating equipment in the United States for all purposes for the year 1944 were less than \$450,000.

18. Fairbanks is engaged in part in the manufacture, at its plants in St. Johnsbury, Vermont, Moline, Illinois, and elsewhere, of weighing equipment, including platform scales used for the purpose of weighing and recording weights of cylinders filled with liquid chlorine. Fairbanks ships such weighing equipment from its plants in Vermont and Illinois in interstate commerce to purchasers in other States of the United States including the State of Rhode Island. A platform scale is essential in the use of gas chlorinating equipment to indicate the amount of chlorine on hand at any particular time and to enable the calculation of the rate of consumption thereof. From 1931 to the date of the filing of this information in excess of 75% of the specifications issued in connection with the purchase of gas chlorinating equipment for the chlorination of water and sewage have required the furnishing of said platform scales used for said purpose.

19. Bellige, Inc. is engaged in part in the manufacture of chloring comparators. It manufactures said equipment at its plant in Long Island City, New York, and sells and ships said equipment in interstate commerce to purchasers in other States of the United States, including the State of

Rhode Island. A comparator is essential in the use of chlorinating equipment and is a device for determining the amount of chlorine present in a liquid, and the hydrogen-ion concentration of the liquid (commonly designated as the "pH"). From 1931 to the date of the filing of this information, more than 75% of the specifications issued in connection with the purchase of chlorinating equipment for the chlorination of water and sewage have required the furnishing of a Hellige comparator.

20. Schutte-Koerting is engaged in part in the manufacture of rotameters. Its manufacturers said equipment at its plant in Philadelphia, Pennsylvania, and sells and ships said equipment in interstate commerce to purchasers in States of The United States, other than the State of Pennsylvania. A meter to indicate the rate of flow of chlorine gas is essential to the manufacture and operation of gas chlorinating equipment. A rotameter is a type of meter which is used on certain gas chlorinating equipment. 658 * manufactured by others than defendants which competes with the gas chlorinating equipment manufactured by W&T.

III. THE COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE

21. Beginning in or about the year 1917, the exact date being unknown, and continuing thereafter up to and including the date of the filing of this information, W&T, Tiernan and Builders, and other persons unknown, knowingly engaged, in part within the District of Rhode Island, in a combination and conspiracy in restraint of the aforesaid trade and commerce among the several States in chlorinating equipment in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" as amended (15 U. S. C., Sec. 1) commonly known as the Sherman Act.

22. At various times, and from time to time between 1917 and the date of the filing of this information, the exact dates being unknown, the other defendants joined the said combination and conspiracy, and became parties thereto and continued to engage and participate therein at all times thereafter up to and including the date of the filing of this information.

23. The combination and conspiracy herein charged has consisted of a continuing agreement and concert of action

among the defendants and others unknown, the terms of which have been substantially that the defendants exclude others from the manufacture and distribution of chlorinating equipment and eliminate competition among themselves in the manufacture and distribution of chlorinating equipment by:

(a) Acquiring by purchase, from persons other than their own employees, patents and exclusive rights under patents covering inventions relating to chlorinating equipment;

(b) Instituting and threatening to institute suits for alleged infringement of said patents;

659 (c) Inducing competitors to agree not to engage in the manufacture and distribution of chlorinating equipment;

(d) Acquiring the capital stock or business assets of competitors;

(e) Refusing to furnish supplies, including flour, ageing and bleaching agents, and services used in connection with chlorinating equipment, except on the condition that the chlorinating equipment be obtained from the defendants;

(f) Inducing others not to sell various parts, devices and appliances required for the manufacture, sale or operation of chlorinating equipment to anyone save the defendants;

(g) Dividing the field for distribution of gas chlorinating equipment by agreeing that certain of the defendants would not manufacture or sell chlorinating equipment having a capacity in excess of 1,500,000 gallons of water per day;

(h) Entering into agreements with large filter and construction companies and general contractors of the type referred to in paragraph 9 of this information under the terms of which said companies and contractors agree to distribute only defendants' chlorinating equipment;

(i) Entering into agreements with the companies and contractors referred to in subparagraph (h) above, fixing the prices, terms and conditions upon which said companies and contractors are required to offer for resale chlorinating equipment manufactured by defendants;

(j) Inducing sanitary engineers, consulting engineers, contractors and others unknown, who are employed by purchasers (including federal, state and local government agencies) for the purpose of preparing specifications for chlorinating equipment and determining whether individ-

not bids comply with such specifications, to joint and engage in said combination and conspiracy by:

(i) causing invitations to bid for contracts to be issued only to defendants;

666 (ii) preparing for issuance plans and specifications which restrain others from bidding;

(iii) preparing plans and specifications for issuance which disqualify or discourage all bidders except defendants;

(iv) causing the rejection of bids which offer for sale chlorinating equipment not manufactured by defendants; and

(v) causing the rejection of all bids and the issuance of new invitations to bid for the purpose of enabling the defendants to underbid the low bidder.

(k) Using defendants' position in the manufacture and distribution of chlorinating equipment to have or attempt to have:

(i) invitations to bid for contracts for said equipment issued only to defendants;

(ii) plans and specifications prepared and issued for said equipment that restrain others from bidding;

(iii) plans and specifications issued which disqualify or discourage all bidders except the defendants;

(iv) all bids rejected and new invitations to bid issued for the purpose of enabling the defendants or any one of them to underbid the low bidder.

(l) Cutting prices on chlorinating equipment, with the intention and purpose of eliminating competition;

(m) Circulating false rumors and unfair reports derogatory to other manufacturers of chlorinating equipment;

(n) Spying upon other manufacturers of chlorinating equipment and thereby obtaining confidential information from their files;

(o) Inducing the contractors and companies referred to in paragraph 9 of this information to submit com-

661 plementary or dummy bids in ostensible but not intended competition with bids submitted by one or more of the defendants, in order to provide color of compliance with laws or regulations requiring competitive bidding;

(p) Furnishing chlorinating equipment to prospective purchasers without cost for the purpose of preventing the sale of competitive chlorinating equipment and driving competitors out of business.

24. During the period of time covered by this information and for the purpose of accomplishing the offense heretofore charged, the defendants, by concerted action, have done those things heretofore alleged, including the acts and things described in the following paragraphs.

A. Acquisition of Patents and Competitors Serving the Sanitary Field

25. On or about November 20, 1917, W&T acquired from Electro Bleaching Gas Co. (hereinafter sometimes referred to as Electro), then in competition with W&T in the manufacture and sale of chlorinating equipment (a) an exclusive license to use and sell under the Ornstein patents Nos. 1,142,361 and 1,233,371 covering inventions relating to chlorinating equipment, (b) the chlorinating equipment business of Electro, including all manufacturing and sales data pertaining thereto, (c) an agreement by Electro and its officers and directors to refrain from engaging thereafter in the chlorinating equipment business, and (d) an assignment of Electro's exclusive license from Builders under the Gregory patents Nos. 868,776 and 857,343. Builders approved the assignment by Electro of the exclusive license under the said Gregory patents. Thereafter, commencing in 1919 W&T instituted at least eight suits for infringement of said patent No. 1,142,361. In one of these suits the patent was held not to have been infringed; in the others the patent was held valid and infringed.

26. In 1917, W&T acquired from one Major Carl R. Darnall the assignment of United States Letters Patent No. 1,007,647 covering an invention relating to chlorinating equipment. Thereafter W&T instituted suit against The Village of LeRoy, New York, for infringement of said patent No. 1,007,647. The Court held the patent valid and infringed.

27. On or about July 13, 1936 W&T acquired from one George Ornstein an exclusive license under United States Letters Patent Nos. 1,944,803 and 1,944,804 covering inventions relating to chlorinating equipment. Said license is still in full force and effect.

28. On or about April 13, 1937, W&T acquired from Dr. Richard Pomeroy and Arthur P. Banta United States Letters Patent No. 2,076,264 covering an invention relating to chlorinating equipment. Thereafter W&T and W&T Sales induced others to have specifications issued for chlorinating equipment specifying the invention covered by said patent.

29. On or about December 3, 1936, W&T acquired, from one H. J. Pardee, an exclusive license under United States Letters Patent No. 2,034,400 covering an invention relating to chlorinating equipment. Said license is for the life of the patent and is still in full force and effect. Thereafter W&T and W&T Sales induced others to have specifications issued for chlorinating equipment specifying the invention covered by said patent.

30. On or about July 30, 1940, in order to intimidate prospective purchasers of chlorinating equipment not manufactured by the defendants, W&T instituted a patent infringement suit against the Borough of Ephrata, Pennsylvania, and one John Lewis, a contractor, for alleged patent infringement by reason of the installation of gas-chlorinating equipment manufactured by the Everson Manufacturing Company, Chicago, Illinois. The case was dismissed by the Court on November 21, 1945, for want of prosecution.

31. In 1930 W&T bought the assets of the Paraden Company, then in competition with W&T in the manufacture and distribution of chlorinating equipment, and at various times after July 30, 1940, attempted to purchase the assets of the Everson Manufacturing Company.

32. On or about May 1, 1940, in consideration of the payment of \$68,250 to Howard J. Pardee by Orchard, and a promise by said Orchard to cause the employment of said Pardee by W&T, at an annual salary of \$7,500, said Pardee caused the assets of the Pardee Engineering Company, then in competition with W&T in the manufacture and distribution of chlorinating equipment, to be transferred to Orchard. At all times since May 1, 1940, to the date of the filing of this information, said Pardee has been in the employ of W&T.

33. On November 4, 1935, W&T paid R. W. Sparling, then in competition with W&T in the manufacture and distribution of chlorinating equipment, \$5,000 cash and agreed to pay \$40,000 per year thereafter for 17 years for which Sparling granted to W&T an exclusive license to all proprietary and inventive rights in the Sparling chlorinator. Sparling agreed that neither he nor his son would engage in the chlorinating equipment business during the life of said agreement. Said agreement is still in full force and effect.

B. Acquisition of Patents and Competitors Serving the Flour Milling Field and the Organization of W&T Sales

34. Prior to the year 1928 W&T licensed flour millers to use the patented Agene Process for the treating and bleaching of flour, and supplied said millers the chlorinating equipment with which to practice said process. Prior to 1928 the Novadel Process Company licensed flour millers to use the Novadel Process, and "Novadelox" covered by United States Letters Patent No. 1,539,791, a product for the bleaching of flour which competed with W&T's Agene Process. On September 15, 1928, W&T, W&T Prod

644. ucts, Tiernan, Orchard, Peet and others, unknown, caused a new corporation to be formed under the name of Novadel-Agene Corporation, which is the defendant Novadel, and caused to be transferred to it, among various assets, W&T's rights under the Agene Process in consideration of the issue to W&T of approximately 40% of the voting stock of said Novadel and the exclusive rights hereinafter described. As a part of the same transaction, said Novadel Process Company transferred to said Novadel, along with other assets, its rights, including patent rights, to "Novadelox" and the Novadel Process, and said W&T entered into a contract with Novadel under the terms of which W&T was given (a) the exclusive right to manufacture all mechanical equipment, including chlorinating equipment required for the practice of any and all of the processes, including patented processes owned by Novadel, and (b) the exclusive agency for the distribution of Novadel's said processes and products.

35. Beginning in or about September 1928, Novadel, W&T and W&T Products marketed the processes and products of Novadel and W&T designed to serve the flour milling industry throughout the United States under uniform contracts which, while varying from time to time in their formal aspects, required the users of said processes (a) to lease or buy equipment manufactured by W&T, (b) to use in said equipment and in working the said processes only the material furnished by Novadel, and (c) to obtain the necessary supplies and services required in connection with the use of said equipment and said processes from W&T, W&T Products, Novadel and Industrial. On or about April 28, 1942, Novadel entered into new standard form contracts with certain flour millers under the terms of which said flour millers agreed to use the services,

chlorinating equipment and maturing agents supplied by Novadel for the ageing and bleaching of all the flour in all the mills of each of said millers. At no time since 1928 have defendants supplied ageing and bleaching materials to purchasers unless said purchasers used chlorinating equipment manufactured by W&T.

665 36. Sometime prior to the year 1930, one John Hogan of Chicago, Illinois, began to produce a chlorine compound called "Beta-Chloro" for maturing flour, which competed with Novadel's processes and "Novadelox", and said Hogan organized the Industrial Appliance Corporation under the laws of Illinois for the production and marketing thereof. In August 1930 Novadel caused Industrial to be organized under the laws of Delaware and acquired all of its capital stock. Thereupon Novadel caused Industrial to acquire all of the assets of Industrial Appliance Corporation of Illinois in order to eliminate from the market a flour bleaching and maturing agent which could be used without the use of W&T chlorinating equipment. On August 27, 1930, Industrial entered into a contract with W&T under the terms of which W&T was constituted the exclusive agent of Industrial for the sale, installation, servicing and distribution of all apparatus, equipment including chlorinating equipment, and materials then in use, or thereafter to be used, in Industrial's business in the United States and Canada.

37. In 1933, Orchard, Peet and others unknown, caused W&T Sales to be organized under the laws of New Jersey for the purpose of transacting the business of W&T in certain states, principally on the West Coast of the United States. Thereafter W&T Sales entered into contracts with W&T, W&T Products, Novadel and Industrial, by the terms of which W&T Sales was constituted the exclusive agent of said defendants in certain states in the United States for the sale and distribution of products manufactured by the said defendants. Each of said contracts fixed the price at which W&T Sales was to offer said products for sale.

38. In 1940 one Frederick H. Penn was conducting a business under the trade name and style of "Superlite Company" and, under patent No. 2,208,471, was manufacturing a benzoyl peroxide bleaching compound known as "Superglite" for the bleaching of flour. "Superglite" was competitive with "Novadelox", the Agene Process and "Beta-Chloro". On August 16, 1938,

Novadel filed a suit for alleged patent infringement against said Penn. In his answer to said suit Penn alleged that Novadel had improperly used said patents to create a monopoly in an unpatented article. In or about December 1941, in order to avoid a trial on the merits of the defense of said Penn and to eliminate from the market a flour bleaching and maturing agent which could be used without the use of W&T chlorinating equipment, Novadel acquired the assets, including patents, under which Penn was conducting business as the Superlite Company.

C. Preemption of Sources of Supply of Parts for Chlorinating Equipment

39. On or about July 28, 1931, W&T entered into a contract with Hellige by the terms of which defendant W&T was given the exclusive sales agency, within the United States and Canada, for the sale of Hellige comparators in the price range below \$37 in the sanitary field. W&T agreed to refrain from the sale of comparators in the price range above \$37, within the United States and Canada, in the sanitary field, and Hellige agreed to refrain from selling comparators in the price range below \$37, within the United States and Canada, in the sanitary field. On April 15, 1941, because of fear of prosecution for violation of the federal antitrust laws, Hellige gave notice of cancellation of said written contract, but thereafter for a period of 16 months the parties agreed to continue to act, and did act, as if it were in full force and effect.

40. In or about the year 1931, W&T entered into an agreement with Fairbanks by the terms of which Fairbanks agreed to sell scales for use with chlorinating equipment to W&T exclusively. Said agreement is still in full force and effect, and Fairbanks has refused to sell said scales to competitors of defendants.

41. In or about the year 1931, W&T entered into an agreement with Schutte-Koerting by the terms of which Schutte-Koerting agreed to sell its rotameters for use in the sanitary field to W&T exclusively. Said agreement is still in full force and effect, and Schutte-Koerting has refused to sell said rotameters to competitors of defendants.

D. Selling the World Among the Defendants for Distribution of Chlorinating Equipment

42. In 1935, W&T and Builders were in competition with each other in the manufacture and sale of chlorinating

equipment and in the development, manufacture and sale of telemetering equipment. In 1935, the exact date being unknown Builders and Chafee entered into an agreement with W&T and W&T Products by the terms of which W&T and W&T Products agreed to refrain from the manufacture and sale of telemetering equipment for use in the industrial field, as distinguished from the sanitary field, and Builders and Chafee agreed to limit the sales of Props. chlorinating equipment to installations involving the purification of less than 1,500,000 gallons of water per day. The parties agreed also to cooperate and work together for the best interests of both. Said agreement is still in full force and effect. Thereafter, applications for United States Letters Patent covering inventions relating to the process of telemetering having been acquired by W&T from C. F. Wallace (Serial No. 588,595) and by Builders from George T. Huxford (Serial No. 621,211), W&T, W&T Products and Orchard, on April 21, 1938, pursuant to the aforesaid agreement of 1935, entered into license agreements with Builders by the terms of which Builders acquired an exclusive license under said Wallace application and any patent thereafter issued upon said application, and W&T Products acquired a non-exclusive license limited to the sanitary field and declining under said Huxford application and any patent thereafter issued thereon and under eleven additional patents owned by Builders. Said cross license is still in force and effect.

F. Preemption of Sales Outlets for Chlorinating Equipment

43. Commencing in or about the year 1925, and continuing until the date of the filing of this information, W&T, W&T Products and W&T Sales have entered into contracts with more than 150 large filter companies, construction companies, and general contractors. Said companies and contractors constitute the most important sales outlets for chlorinating equipment in the sanitary field. In said agreements said companies and contractors agreed to purchase and resell the chlorinating equipment of W&T exclusively, at the prices and on the terms and conditions fixed by W&T, W&T Products, and W&T Sales.

IV. EFFECTS

44. The combination and conspiracy hereinbefore alleged has had many effects, among which are the following:

(a) free and vigorous competition in the production and distribution of chlorinating equipment in interstate commerce in the United States has been prevented and restrained;

(b) arbitrary, artificial, unreasonable, excessive and non-competitive prices have been exacted from purchasers of chlorinating equipment, including the United States Government;

(c) development and improvement of chlorinating equipment has been impeded and retarded;

(d) a substantial number of persons have been excluded from the chlorinating equipment industry and others have been restricted in their opportunity to engage in said industry.

V. JURISDICTION AND VENUE

The combination and conspiracy, hereinbefore alleged, has operated and has been carried out, in part, within the District of Rhode Island. The defendants, within the applicable period of the statute of limitations, in effectuating and carrying out said combination and conspiracy, have, within said District, performed many acts among which are the following:

(a) Builders owns, maintains and operates factories and sales offices in the District of Rhode Island from which it sells and ships substantial quantities of chlorinating equipment in interstate commerce.

(b) W&T sells and ships chlorinating equipment, in interstate commerce into the District of Rhode Island, buys various types of equipment from Builders within said district and ships the same out of Rhode Island in interstate commerce, and within the District of Rhode Island has induced purchasers to issue specifications written in such form that only defendants could comply therewith.

(c) W&T, W&T Products, Tiersan, Orchard, Builders and Chafee, within the District of Rhode Island negotiated and entered into the agreements described and alleged in paragraph 42 of this information.

(d) Builders and Chafee within the District of Rhode Island, performed and carried out the terms of said agreements described and alleged in paragraph 42 of this information.

SECOND COUNT

46. The United States of America, acting through its above-named representatives, realleges all of the allega-

tions contained in paragraph 1 through paragraph 20 of the first count of this information.

47. Beginning in or about the year 1917, the exact date being unknown, and continuing hereafter up to and including the date of the filing of this information,

670 W&T, Tiernan, Builders, and other persons unknown, knowingly engaged, in part within the District of Rhode Island, in a combination and conspiracy to monopolize the aforesaid trade and commerce among the several States in chlorinating equipment in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" as amended (15 U. S. C., Section 2), commonly known as the Sherman Act.

48. The United States of America, acting through its above-named representatives, realleges all of the allegations contained in paragraph 22 through paragraph 45 of the first count of this information.

THIRD COUNT

49. The following-named corporations are hereby made defendants in this count. Each defendant corporation was organized in the year, exist under the laws of the State, has its principal place of business in the city, and will hereafter be referred to by the designation, below set opposite its individual names:

<i>Name</i>	<i>Year</i>	<i>State</i>	<i>Principal Office</i>	<i>Reference Designation</i>
Wallace & Tiernan Company, Inc.	1913	New York	Belleville, New Jersey	W&T
Wallace & Tiernan Products, Inc.	1923	New Jersey	Belleville, New Jersey	W&T Products
Wallace & Tiernan Sales Corporation	1933	New Jersey	Belleville, New Jersey	W&T Sales
Novadel-Agene Corporation	1928	Delaware	Belleville, New Jersey	Novadel
Industrial Appliance Corporation	1930	Delaware	Belleville, New Jersey	Industrial

Defendant Martin F. Tiernan and one Charles F. Wallace, own or control 75% or more of the capital stock of defendants W&T and W&T Products. Defendants William J. Orchard and Gerald D. Peet own 70% of the

671 capital stock of defendant W&T Sales. Defendant W&T controls defendant Novadel and owns 40% of its voting stock. Defendant Novadel owns all of the capital stock of defendant Industrial.

50. The individuals whose names and addresses are set forth below are hereby made defendants in this count. Each of said individual defendants is associated with or employed by one or more of said corporate defendants and holds the official titles or positions shown below.

		<i>Defendant Corporation With Which Associated</i>	
<i>Name of Individual</i>	<i>Address</i>	<i>Position or Title</i>	
Martin F. Tieróan	Belleville, New Jersey	President, Treasurer and Director	W&T
		President, Director	Novadel
William L. Orchard	Belleville, New Jersey	General Manager	W&T, W&T Products, W&T Sales, Novadel and Industrial
		President, Director Treasurer, Sec'y, and Director	W&T Products W&T Sales
		Vice-President and Treasurer	Novadel Industrial
Gerald D. Peet	Belleville, New Jersey	Chief Engineer -	W&T, W&T Products, W&T Sales, Novadel and Industrial
		Treasurer, Sec'y, and Director	W&T Products
		President, Director Secretary	W&T Sales Novadel
Harold S. Hutton	Belleville, New Jersey	Sales Manager	W&T, W&T Products W&T Sales, Novadel and Industrial
Vincent Pisani	Belleville, New Jersey	Manager, Sanitary Sales	W&T, W&T Products and W&T Sales
Cornelius F. Schenck	Belleville, New Jersey	Director of Sales Engineering	W&T, W&T Products and W&T Sales

Each individual defendant will hereinafter be referred to by his last name.

51. Builders Iron Foundry, sometimes in this count referred to as Builders, is a corporation organized and existing under and by virtue of the laws of the State of Rhode Island having its principal place of business at Providence,

Rhode Island. Henry S. Chafee, sometimes in this count referred to as Chafee, is, and has been President, Treasurer and Director of Builders.

52. Hellige, Inc., sometimes in this count referred to as Hellige, is a corporation organized and existing under and by virtue of the laws of the State of New York having its original place of business at Long Island City, New York.

33. Schutte & Koerting Company, sometimes in this count referred to as Schutte-Koerting, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania having its principal place of business at Philadelphia, Pennsylvania.

34. Fairbanks, Morse & Company, sometimes in this count referred to as Fairbanks, is a corporation organized and existing under and by virtue of the laws of the State of Illinois having its principal place of business at Chicago, Illinois.

35. The United States of America, acting through its above-named representatives, realleges all of the allegations contained in paragraph 3 through paragraph 20 of the first count of this information.

36. Beginning in or about the year 1917, the exact date being unknown, and continuing thereafter up to and including the date of the filing of this information, W&T, Tiernan, and other persons unknown, knowingly engaged, in part within the District of Rhode Island, in an attempt to monopolize the aforesaid trade and commerce in gas-chlorinating equipment in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended (15 U. S. C. Section 2), commonly known as the Sherman Act.

37. At various times, and from time to time between 1917 and the date of the filing of this information, the exact date being unknown, the other defendants joined in the attempt to monopolize and became parties thereto and continued to engage and participate therein at all times thereafter up to and including the date of the filing of this information.

38. The offense herein charged has been carried out by means of a continuing agreement and concert of action among the defendants and others unknown, the terms of which have been substantially that the defendants exclude others from the manufacture and distribution of gas chlorinating equipment and eliminate competition among themselves in the manufacture and distribution of gas chlorinating equipment by:

(a) Acquiring by purchase, from persons other than their own employees, patents and exclusive rights under patents, covering inventions relating to chlorinating equipment;

(b) Instituting and threatening to institute suits for alleged infringement of said patents;

(c) Inducing competitors to agree not to engage in the manufacture and distribution of chlorinating equipment;

(d) Acquiring the capital stock or business assets of competitors;

(e) Refusing to furnish supplies, including flour ageing and bleaching agents, and services used in connection with chlorinating equipment except on the condition that the chlorinating equipment be obtained from the defendants;

(f) Inducing others not to sell various parts, devices and appliances required for the manufacture, sale or operation of chlorinating equipment to anyone save the defendants;

(g) Dividing the field for distribution of gas chlorinating equipment by agreeing that certain of the defendants would not manufacture or sell chlorinating equipment having a capacity in excess of 1,500,000 gallons of water per day;

(h) Entering into agreements with large filter and construction companies and general contractors of the type referred to in paragraph 9 of this information under 674 the terms of which said companies and contractors agree to distribute only defendants' chlorinating equipment;

(i) Entering into agreements with the companies and contractors referred to in subparagraph (h) above, fixing the prices, terms and conditions upon which said companies and contractors are required to offer for resale chlorinating equipment manufactured by defendants;

(j) Inducing sanitary engineers, consulting engineers, contractors and others, employed by purchasers (including federal, state and local government agencies) for the purpose of preparing specifications for chlorinating equipment and determining whether individual bids comply with such specifications, to join and engage in the offense herein charged by

(i) causing invitations to bid for contracts to be issued only to defendants;

(ii) preparing for issuance plans and specifications which restrain others from bidding;

(iii) preparing plans and specifications for issuance which disqualify or discourage all bidders except defendants;

(iv) causing the rejection of bids which offer for sale chlorinating equipment not manufactured by defendants;

and

(v) causing the rejection of all bids and the issuance of new invitations to bid for the purpose of enabling the defendants to underbid the low bidder.

(4) Using defendants' position in the manufacture and distribution of chlorinating equipment to have or attempt to have:

(i) invitations to bid for contracts for said equipment issued only to defendants;

(ii) plans and specifications prepared and issued for said equipment that restrain others from bidding;

675 (iii) plans and specifications issued which disqualify or discourage all bidders except the defendants;

(iv) all bids rejected and new invitations to bid issued for the purpose of enabling the defendants or any one of them to underbid the low bidder.

(l) Cutting prices on chlorinating equipment with the intention and purpose of eliminating competition;

(m) Circulating false rumors and unfair reports derogatory to other manufacturers of chlorinating equipment;

(n) Spying upon other manufacturers of chlorinating equipment and thereby obtaining confidential information from their files;

(o) Inducing the contractors and companies referred to in paragraph 9 of this information to submit complementary or dummy bids in ostensible but not intended competition with bids submitted by one or more of the defendants, in order to provide color of compliance with laws or regulations requiring competitive bidding;

(p) Furnishing chlorinating equipment to prospective purchasers without cost for the purpose of preventing the sale of competitive chlorinating equipment and driving competitors out of business.

59. The United States of America, acting through its above-named representatives, recollects all of the allegations contained in paragraph 24 through paragraph 43 of the first count of this information:

60. The unlawful attempt to monopolize heretofore alleged has had the effects among others, set forth in paragraph 44, subdivisions (a) through subdivision (e), of the first count of this information, said subdivisions of said paragraph being heretofore alleged with the same force and effect as though here set forth in full.

61. The unlawful attempt to monopolize heretofore alleged has operated and has been carried out, in part,

within the District of Rhode Island. The defendants, within the applicable period of the statute of limitations, in furtherance of said unlawful attempt to monopolize, have, within said District, performed, among others, the acts described in paragraph 45, subdivisions (b) and (c), of the first count of this information, said subdivisions of said paragraph being here realleged with the same force and effect as though here set forth in full.

Fourth Count

62. The United States of America, acting through its above named representatives, realleges all of the allegations contained in paragraph 49 through paragraph 55 of the third count of this information.

63. Beginning in or about the year 1917, the exact date being unknown, and continuing thereafter up to and including the date of the filing of this information, W&T, Tiernan, and other persons unknown, have knowingly monopolized, in part within the District of Rhode Island, the aforesaid trade and commerce among the several States in gas chlorinating equipment in violation of Section 2 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" as amended (15 U. S. C., Section 2), commonly known as the Sherman Act.

64. At various times, and from time to time between 1917 and the date of the filing of this information, the exact date being unknown, the other defendants joined in the unlawful monopolization and became parties thereto and continued to engage and participate therein at all times thereafter up to and including the date of the filing of this information.

65. The United States of America, acting through its above named representatives, realleges all of the allegations contained in paragraph 58 of the third count of this information.

66. The United States of America, acting through its above named representatives, realleges all of the allegations contained in paragraph 24 through paragraph 43 of the first count of this information.

67. The unlawful monopoly hereinbefore alleged has had the effects, among others, set forth in paragraph 44, subdivisions (a) through (e) of the first count of this information, said subdivisions of said paragraph being here realleged with the same force and effect as though here set forth in full.

68. The unlawful monopoly heretofore alleged has operated and has been carried out, in part, within the District of Rhode Island. The defendants, within the applicable period of the statute of limitations, in furtherance of said unlawful monopolization, have, within said District, performed, among others, the acts described in paragraph 43, subdivisions (b) and (c) of the first count of this information, said subdivisions of said paragraph being here read along with the same force and effect as though here set forth in full.

JOSEPH W. KELLUM,
by A. K.

Special Assistants to
the Attorney General
ALFRED KAUSTED,
KENNETH K. KIRKMAN,
Special Attorneys

TOM C. CRYAN,
Attorney General

WENDELL BUDGE,
Assistant Attorney General

GEORGE F. TROY,
United States Attorney

678. In United States District Court
Civil Action No. 765

Opinion—March 26, 1948.

MARTIN, J. This matter was heard on the Government's (1) Motion To Vacate Order On Motion For Return Of Photostat Copies Of Documents, (2) Motion For Production Of Documents Under Rule 34, which said motions were filed April 14, 1946, and (3) Motion For Production Of Photostatic Copies Of Documents Surrendered by Plaintiff, filed April 22, 1948.

The complaint charges violations, by the defendants of Sections 1 and 2 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by Act of August 17, 1937, c. 790, 50 Stat. 693, 15 F. S. C. 1 and 2).

The motion to vacate order on motion for return of photostat copies of documents entered on February 18, 1948, in United States v. Wallace & Tiernan Company, Inc., *et al.*, Indictment No. 6055, alleges the following grounds: (1) The photostatic copies of documents which are to be subject of said order are necessary to the plaintiff in the trial of this cause; (2) Knowledge of the existence and contents of many of the documents from which said photostatic copies were prepared was obtained by the plaintiff prior to, and independently of, the grand jury investigation conducted by the additional grand jury for the November 1945 term of this Court.

The grounds alleged in the motion for the production of photostatic copies of documents surrendered by the plaintiff are the same.

In the motion for the production of the documents under Rule 34, the plaintiff moves the Court order the defendants Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation to produce and to permit the plaintiff to inspect and copy or photograph each of the following documents which are in the possession, custody or control of the defendant:

Those of the documents produced by defendants before the additional grand jury for the November 1945 term of this Court which were subjects of the photostatic copies from time to time delivered by the Government to defendants and which were returned to defendants pursuant to the order of this Court entered on March 19, 1947 in United States v. Wallace & Tiernan Company, Inc., *et al.*, Indictment No. 6055. Said documents may be more particularly identified by reference to plaintiff's Office Record of Documents, a photostatic copy of which is filed herewith as an appendix hereto and made a part hereof as follows: (When mention of documents follows).

The motion further alleges that Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation have the possession, custody, or control of each of the foregoing documents. Each of them constitute or contains evidence relevant and material to the matters involved in this action as is more fully shown in the affidavit of Alfred Karsted filed in support hereof.

Alfred Karsted, Special Attorney in the Antitrust Division of the Department of Justice, has filed an affidavit in

support of motion to quash order on motion for return of photostat copies of documents, which in substance states that since 1945 he has been actively engaged in the investigation of alleged violations of the antitrust laws by members of the chlorinating equipment manufacturing industry, including Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and Novadel Agene Corporation; that he assisted in the presentation of evidence concerning such alleged violations to the additional grand jury for the November 1945 term of this Court and in the preparation of the complaint in this cause; that in support of the charges made in this case the plaintiff relies principally upon documents from the files of the aforesaid companies, the relevancy and materiality of which appear in affiant's affidavit filed in support of the Motion for Production of Documents under Rule 34; that there are in excess of 5,000 such documents in the possession of the companies; that to prepare for trial, plaintiff must have available to it copies of said documents in order to select

and organize those which it deems desirable to offer in evidence in the trial of the case and to facilitate the pre-trial preparation of witnesses whose recollection must be refreshed by the contents of many of the documents; that the photostatic copies of documents involved in the order of this Court of February 18, 1948, are the only copies in the possession of the plaintiff of the aforesaid documentary evidence; that if plaintiff is compelled to return said photostatic copies to said companies and is not permitted to obtain other copies of the documents, plaintiff will not be able to organize its documentary evidence nor to prepare its witnesses and, therefore, will be unable to prepare adequately for the trial of this cause.

Mr. Karsted's affidavit in support of the Motion for Production of Documents under Rule 34 alleges in substance that the three Wallace & Tiernan Companies produced these documents in response to grand jury subpoenas *duces tecum* issued April 29, 1946, out of the court and were impounded by order of the court dated June 3, 1946, and were returned to the companies by the Government pursuant to the Court's order entered on March 19, 1947; that the complaint in this action charges the three Wallace & Tiernan Companies and others with unlawfully monopolizing and attempting to monopolize interstate trade and commerce in gas chlorinating equipment and with unlawful combining and conspiring to restrain said interstate

trade and commerce, in violation of Sections 1 and 2 of the Sherman Act; that sixteen types of activities of the defendants are set forth in paragraph 24 (a to p); that in paragraph 24(a) of the complaint the defendants are charged with "acquiring by purchase, from persons other than their own employees, patents and exclusive rights under patents, covering inventions relating to chlorinating equipment"; that this allegation is supported by the documents called for in the motion and described as follows in the Government's "Office Record of Documents" filed with this motion:

Agreement with Banta

Agreement with Scott Parson

Agreement with Ornstein

The affidavit makes similar allegations as to paragraphs 24(e), 24(f), 24(g), 24(h) and 24(i).

The affidavit further alleges that the remainder of the documents called for in the motion and described in the Government's "Office Record of Documents" filed with the motion consists of particular documents found in the various "job files", "interoffice files", "branch office files", "specification files" and other files of the defendant companies; that these documents consist principally of correspondence and memoranda concerning actual or potential sales of chlorinating equipment together with plans, specifications and purchase orders in connection with such sales; that

the documents illustrate the actual working of the alleged conspiracy and show the various ways in which the defendants attempted to prevent competitors from obtaining contracts for the installation by them of chlorinating equipment made by such competitors; that the documentary evidence of this type called for by the motion tends to prove the following activities of the defendants designed to monopolize and restrain trade, as alleged in paragraphs 24 to 46, inclusive, of the complaint herein. Four paragraphs follow setting forth such activities.

Chalmers Hamill, a Special Assistant to the Attorney General of the United States, assigned to the Antitrust Division of the Department of Justice, has also filed an affidavit in support of the motion for production of documents under Rule 24 and the motion to vacate order on motion for return of photostat copies of documents.

The affidavit of Mr. Hamill in substance alleges that from October 1, 1942 until January 1, 1947, he had supervision and was in active charge of an investigation by the anti-

trust division of alleged violations of the antitrust law by members of the chlorinating equipment manufacturing industry including Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation; that assisting affiant in said investigation and acting under his immediate supervision and direction were Alfred Karsted and Kenzie K. Kirkham,

685 Special Attorneys in the Antitrust Division of the Department of Justice and Roy C. Cook, an economic expert in the Antitrust Division of the Department of Justice; that in furtherance of the aforesaid investigation and pursuant to a voluntary agreement between the Antitrust Division and Wallace & Tiernan Company, Inc., on December 18, 1944, Mr. Cook, under the direction of affiant, commenced an examination of certain of the files of the company at its offices in Belleville, New Jersey; that after Mr. Cook had examined certain of the files of the company over a period of about 3 days, the company declined voluntarily to allow representatives of the Department of Justice to conduct any further examination of its files; that thereupon affiant on February 6, 1945, caused to be issued out of the United States District Court for the District of New Jersey, Trenton Division, a subpoena *duces tecum* directed to Wallace & Tiernan Company, Inc., returnable on March 6, 1945, requiring the production before a grand jury for said court of certain designated files and documents of the company; that on March 1, 1945, an agreement was reached between the antitrust division and Wallace & Tiernan Company, Inc. under the terms of which representatives of the antitrust division were to be admitted to the premises of the company at Belleville, New

Jersey, for the purpose of examining documents
686 which the company proposed and agreed to assemble in compliance with the subpoena; that pursuant to this understanding from time to time from March 1, 1945, to October 5, 1945, affiant and aforesaid other representatives of the antitrust division examined numerous files and documents of the company produced by it because of the aforesaid subpoena *duces tecum*; that no photostatic copies of the documents thus examined were made at that time but extensive notes and excerpts were made by all representatives of the Division for the purpose of enabling identification of the files and documents considered to be material to the investigation; that upon completion of the aforesaid file examination, the Antitrust Division elected to conduct the investigation of the chlorinating

equipment manufacturing industry before a grand jury sitting in the United States District Court for the District of Rhode Island instead of before a grand jury sitting in the United States District Court for the District of New Jersey; that the grand jury in Rhode Island heard evidence in said investigation from time to time during the period from April 29, 1946 to November 16, 1946; that on April 29, 1946, subpoena *duces tecum* were issued out of this Court directed to Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., and Wallace & Tiernan Sales Corporation, calling upon them to produce before the additional grand jury certain designated documentary material including numerous of the documents and files examined in Belleville, New Jersey, in the aforesaid file examination conducted during the period from March 1, 1945 to October 5, 1945; that the companies produced certain of the documents which were impounded under order of this Court and that from time to time during the grand jury investigation photostatic copies of certain of the documents so produced were made under the affiant's direction and that pursuant to arrangements between counsel for the Wallace & Tiernan Companies and affiant duplicate photostatic copies of all such documents so photostated were delivered to said counsel; that the Appendix to plaintiff's Motion For Production Of Documents under Rule 34 consists of an Office Record of Documents maintained under affiant's direction and supervision which identifies certain of the documents of the Wallace & Tiernan Companies selected during the course of the grand jury investigation and photostated by the government; that numerous of the files described in said Office Record were produced by Wallace & Tiernan Companies for examination by the aforesaid representatives of the Antitrust Division and were examined by them under the direction of affiant at the company's offices at Belleville, New Jersey, during the period between March 1, 1945 and October 5, 1945; that in particular the affiant avers that during the course of said examination he and other representatives of the Antitrust Division, acting under his immediate supervision and direction, examined and thereby learned of the existence and contents of each of the documents identified in the aforesaid Office Record by the following numbers appearing in the first column thereof. (Identification follows.)

Frederick G. Merkel, an Executive Assistant of the Wallace & Tiernan Companies for fifteen years, has filed an

affidavit in opposition to the Motion for Production of Documents under Rule 34 and in reply to the affidavit of Mr. Hamill.

In his affidavit he states:

"I further submit that this motion and the Appendix on which it is based, and the affidavit of Mr. Hamill, show on their face and as a necessary deduction that the Antitrust Division has, in support of this motion and in the preparation of such Appendix and affidavit, made and is making an illegal and unconstitutional use of the documents and the information contained therein which have already been held by this Court to have been illegally and unconstitutionally seized and which information this Court has already, by a decision rendered prior to the institution of this motion and by order entered on April 20, 1948, precluded and restrained the Anti-trust Division from using in any way or for any purpose."

68r Merkel also contends that this motion to produce proceeds upon a violation of the constitutional rights of the defendants for, as declared by the Circuit Court of Appeals for the First Circuit in *Rogers v. United States*, 97 F. 2d 691, the Government is precluded, where it has seized documents in violation of the Fourth Amendment, from using such documents at all,—even as a means for drafting subpoenas describing the papers sought to be produced.

His affidavit further states:

"Furthermore, it should be noted on the record that the subpoena issued in 1945 by the New Jersey Grand Jury was directed to and served upon only one defendant corporation, to wit: Wallace & Tiernan Company, Inc., whereas the subpoenas issued in 1946 by the aforementioned special Grand Jury were directed and served upon Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and Novadel Agene Corporation. In complying with the subpoena issued by the New Jersey 690. Grand Jury deponent caused to be produced for examination by attorneys for the Department of Justice only material coming within the purview of the Wallace & Tiernan Company, Inc. subpoena and germane thereto. All Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation and Novadel Agene Corporation documents called for by this Motion to Produce and its Appendix were, therefore, sub-

mitted for the first time in response to the illegal subpoenas issued by the aforementioned special Grand Jury, each and every one of which were ordered returned to defendants by orders of this Court, dated March 19, 1947, and February 18, 1948.

William H. Edwards, Esq., attorney for the various Wallace & Tiernan Companies, has filed an affidavit in opposition to the above motion. His affidavit reviews the history of Indictment No. 6055, Criminal Information 6070, etc. and contains some seventeen exhibits pertaining to said indictment and information.

691 The Government admits that Mr. Hamill does not identify all of the documents which the Government seeks but only about twenty per cent of them. Mr. Hamill's affidavit does not refer to any documents unconstitutionally seized from any of the defendants other than the Wallace & Tiernan Company, Inc.

In *Rogers v. United States*, 97 F. 2d 691, 692, the Court said:

"The government's position in the District Court and here is that the illegality of the manner by which the evidence is secured is not material in a civil case. The defendant, on the other hand, contends that evidence obtained by the government in violation of the Fourth Amendment, U. S. C. A. Const. Amend. 4, cannot be used at all, in a civil or criminal suit, and in support of his contention relies on *Silverthorne Lumber Company v. United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426.

"In the Supreme Court the order adjudging the company and Frederick W. Silverthorne in contempt was reversed on the ground that the government could not use knowledge that it had illegally gained by seizure of the original papers 'to call upon the owners in a more regular form to produce them'; that, if it could, it would be to reduce the Fourth Amendment, U. S. C. A. Const. Amend. 4, to a form of words; that 'the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely the evidence so acquired shall not be used before the court, but that it shall not be used at all',—even as a means for drafting subpoenas describing the papers sought to be produced.

692 "If a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the

government in violation of the Fourth Amendment, we think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid."

The "Appendix" and the affidavit of Mr. Hamill based thereon, attempt to make use of precluded information in the manner condemned in *Rogers v. United States, supra*.

The motions in substance seek to obtain for use by the plaintiff in the instant case the documentary evidence which has been the subject of previous orders of this Court in the criminal action.

The motion to vacate order on motion for return of photostat copies of documents is academic since the government has already complied with the order of the Court of February 18, 1948, in Indictment No. 6055.

The record does not convince me that knowledge of the existence and contents of definite documents from which photostatic copies were prepared was obtained by the plaintiff prior to, and independently of, the grand jury investigation conducted by the additional grand jury for the November 1945 term of this Court or that the defendants have waived any of their constitutional rights concerning these documents.

Rule 34 of the Federal Rules of Civil Procedure provides in part:

693 "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control;

In his argument on May 3, 1948, Mr. Kelleher, attorney for the plaintiff, said:

" . . . In substance, if it please the Court, these motions seek to obtain for use in the civil action the documentary evidence which has been the subject of previous orders of this Court in the criminal case.

The question then is presented: Can we now obtain the photostatic copies of the documents which have been surrendered pursuant to that order? The other motion, as I have said, calls for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. That motion seeks to obtain the
 694 documents from which the photostatic copies surrendered last week were reproduced, so that before your Honor this morning are two issues presented by these motions. First: May the Government obtain for use in the civil case the photostatic copies of documents surrendered last week? And, secondly: May the Government obtain for use in the civil case, that is, may the Government inspect and make copies of the documentary evidence from which the photostatic copies were made? (Tr. pp. 4, 5.)

The basic issue, of course your Honor, this morning is the question of whether the Government, in the light of the history of these documents in the criminal case, is entitled to obtain the documents for use in the civil case." (Tr. p. 9.)

In *Re Wallace & Turnap Co.*, 76 F. Supp. 215, 217, the Court said:

"In *Johnson v. United States*, 68 S. Ct. 367, 370, the Supreme Court said:

"Thus the Government is obliged to justify the arrest by the search and at the same time to justify
 695 the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

"It is my opinion that the Government, gaining access to the documents by means of an illegal grand jury, has no valid basis in law for the intrusion," which the Government committed in making the photostats of said documents and retaining possession of them.

It seems to me that these motions are an attempt on the part of the Government to reargue in this civil action mat-

ters which have been decided in the criminal case and from which the Government did not appeal.
The plaintiff's motions are denied.

0206

In United States District Court

*Portion of Transcript of Hearing of March 19, 1942
in Indictment No. 6955*

MR. EDWARDS. May it please the Court, there was that matter of the return of the impounded documents that was to stand over until your Honor's decision, and Mr. Tuttle is prepared to argue that motion.

MR. TUTTLE. Your Honor please, I only wish to say a word on that motion because I don't think an extended presentation is necessary, particularly in view of what your Honor has already intimated as a consequence of granting the main motion.

I am presenting this motion originally because, as your Honor has already been informed, I am in charge of the preparation of what was this case, my office being located near that of the defendants, the principal defendants being all located in Belleville, New Jersey, only thirty minutes from New York.

We made this motion within the thirty days which were allowed at the time of the arrangement and we had it under consideration and preparation prior to the announcement by the Supreme Court of the Ballard decision. And then, thereafter, we went along with the thought this motion should stand as a practical matter awaiting the outcome of the motion to dismiss on the ground that the Grand Jury procedure of this particular matter had not been due pro-

The subpoenas that were issued, one set of which we moved to vacate, as your Honor will recall, your Honor denied the motion and there was a second set issued. We again moved to vacate. This time your Honor granted the motion. The third set was made and served on us whereby a large number of additional papers were called for. They were all Grand Jury subpoenas for the presentation of papers before the Grand Jury that found that indictment. No other purpose was stated whatever. The process was solely that the Grand Jury, acting through the Court, called for the production of papers. As a result some papers aggregating 202,000 papers, have been filed here and impounded for the purposes of the Grand Jury by your Honor's order.

It does seem now, in view of the fact that the Grand Jury was not competently and constitutionally constituted, that the process which issued from it and for its purposes would not possibly be regarded as due process. That is, your Honor stated this morning, as I understood you, if the motion were granted, it would be necessary under the law to return the papers.

The COURT. Do you, Mr. Karsted, raise any objection to the granting of this motion?

Mr. KARSTED. Yes, your Honor, the Government wishes to object to that motion.

The COURT. On what ground?

Mr. KARSTED. On the grounds that although the Grand Jury is dismissed and although the documents were originally brought in pursuant to a Grand Jury subpoena, the documents are now in the possession of the Court and are impounded by the Court.

The COURT. The Court got them as a result of an illegal process.

Mr. KARSTED. That is right, your Honor, but the authority indicates it doesn't make any difference how the documents were gotten if they are impounded in the possession of the Court and the Court deems it to be in the public interest.

The COURT. What public interest is the Court concerned with in a matter like this at this time when there is nothing before the Court?

Mr. KARSTED. The civil bill is still pending before the Court.

The COURT. That was on the criminal matter.

Mr. KARSTED. Yes.

The COURT. That is the only thing the Court is concerned with now. When there are documents that grow out of a Grand Jury process that has now been held to be an illegal Grand Jury, doesn't everything that belongs with it become tainted with that illegality?

Mr. KARSTED. There are two factors. The first is an appeal might still be taken and if the judgment of the Court were reversed, then the documents would be just as necessary to the Government in the trial of the case.

Secondly, the duty that is—Let me cite first the *Bendix* case. I think, is direct authority that the Court has the power to impound documents that are necessary even for the trial of the civil case.

The COURT. There is no motion for such impounding before this Court.

Mr. KARSTED. That is because, your Honor, the documents are still impounded.

The COURT. Yes, but aren't they impounded as a result of what has happened through the Grand Jury? That has nothing to do with the civil case, has it? As far as this Court is concerned, Mr. Karsted, isn't the fact the same as if it was never in here, for all purposes, at the moment?

Mr. KARSTED. That might be right.

The COURT. There is nothing before the Court that these papers that were impounded appertain to, is there, as far as this Court is now concerned?

Mr. KARSTED. Not if the Grand Jury is dismissed.

The COURT. How can you hold something? You can't hold the bail, can you, if the indictment is dismissed? What is the difference?

Mr. KARSTED. I suppose I misconceived my remedy. I will have to move for an impounding order.

The COURT. I am only concerned with this motion now. Let me see what the exact wording of it is. Can you find it for me here?

Mr. TUTTLE. The reason why the two motions are before your Honor simultaneously is because of the relation of the one to the other, the process by which the papers were obtained being solely a Grand Jury indictment proceeding.

The COURT. All of these documents were obtained as a result of subpoenas issued at the instance of the Grand Jury which we have held to be an invalid Grand Jury.

Mr. TUTTLE. Precisely, sir, and so denominated in the subpoenas.

The COURT. What do you say to that, Mr. Karsted?

Mr. KARSTED. Your Honor, I have misconceived my remedy in this but could I ask your Honor to delay granting the motion to release the documents a reasonable time, giving the Government time to present a new motion for the impounding of the documents, and the Bendix case is direct authority in that case because there the Grand Jury was indicted without taking any action.

The COURT. The Grand Jury was what?

Mr. KARSTED. —dismissed without taking any action. The Government then went into New Jersey, another state, and filed a civil bill. The defendants wanted their documents back. The Government contended they needed the documents for trial, and the court said that it was clear that the court had power to impound them but the Govern-

ment would have to go before the court before which the civil proceedings were pending, and the court did delay granting the motion long enough to give the Government time to go into New Jersey and file the motion for the impounding.

701 Mr. TUTTLE. May I point out to your Honor—and I venture to call it very seriously to Mr. Karsted's attention—that there is a decided difference between the Bendix case and this case and very serious consequences from the Government's standpoint. In the Bendix case the process by which the papers were obtained in the first instance was valid. It was due process. Now we have a case where necessarily follows this corollary from your Honor's decision today: The process was not due process. I venture to believe Mr. Karsted should consider gravely the consequences of the whole Government's position if he insists on holding onto the papers which were not obtained by due process. I want a note of that on the record.

The COURT. There is no need of further discussion on this, because the Court has already ruled the Grand Jury was illegally constituted. These papers were obtained as a result of subpoenas issued by an illegally constituted Grand Jury. Certainly defendants have a right to the return of their property under those circumstances. The motions for the return of the impounded documents are granted. There are two motions, are there not, Mr. Hogan?

Mr. HOGAN. Yes, your Honor, motion in behalf of Novadel-Agene Corporation and also motion in behalf of Industrial Appliance Corporation, and then the Wallace and Tiernan motions.

The COURT. They are all similar motions and pertain to documents which were obtained as a result of those subpoenas which were issued. Those motions are granted.

702 Lest there be any doubt on the record, the Court was only acting on the motions to dismiss filed. Mr. Coen was asking if it applied to all defendants. I have only ruled on the motions formally before the Court.

(Adjourned at 4:20 P. M.)

I hereby certify that the foregoing, Pages 1 to 99 inclusive, is a true and accurate transcript according to my stenographic notes.

EUNICE J. ARCHAMBAULT,
Official Court Reporter.

703

In District Court of the United States
For the District of Rhode Island

Criminal Action No. 6070

UNITED STATES OF AMERICA,

v.

WALLACE & TIERNAN COMPANY, INC., *Et Al.*

Civil Action No. 705

UNITED STATES OF AMERICA,

v.

WALLACE & TIERNAN COMPANY, INC., *Et Al.*

Before His Honor, Judge Hartigan, Monday, September 8, 1947.

APPEARANCES

For the GOVERNMENT, Grant W. Kelleher, Esq., Special Assistant to the Attorney General. Alfred Karsted, Esq., Special Attorney.

For the DEFENDANTS, Wallace & Tiernan Co., Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation. Charles H. Tuttle, Esq. and Loren N. Wood, Esq., of the New York Bar; Edwards & Angell; William H. Edwards, Esq., Gerald W. Harrington, Esq., and John V. Kean, Esq., appearing.

Novadel-Agene Corporation, Industrial Appliance Corporation. Hogan & Hogan; Edward T. Hogan, Esq., appearing.

Builders Iron Foundry, Henry S. Chafee. Hinckley, Allen, Tillinghast & Wheeler; S. Everett Wilkins, Jr., Esq., appearing.

704 Fairbanks, Morse & Co., George C. Worthley, Tillinghast, Collins & Tanner; Harold E. Staples, Schutte & Koertling. Aisenberg & Joslin; Alfred H. Joslin, Esq., appearing.

Hellige, Inc. Jeremiah Cross, Esq. of the New York Bar.

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Monday, September 8, 1947

10:00 A. M.

The Court, Mr. Edwards?

Mr. EDWARDS, May it please the Court, there are several motions here this morning, your Honor, in three proceedings and I think perhaps it would help if I briefly

summarized what those motions are and then we could agree, subject to your Honor's approval, on the best way of going about the argument of them.

I am speaking, of course, for the three Wallace & Tiernan companies and the six individual defendants who are associated with those companies and also, with Mr. Edward Hogan's permission, for two other related corporations, the Novadel-Agene Corporation and the Industrial Appliance Corporation.

First of all, we have in Miscellaneous No. 5347, which is a separate proceeding, a motion for return of certain photostatic copies of documents which are in the possession of the United States. On that motion a brief has been filed by the four moving parties, the three Wallace & Tiernan companies and Novadel-Agene Corporation, and a brief has also been filed by the Government; and reply briefs were due today and I believe the Government has filed a reply brief and we also wish at this time to file a reply brief.

Mr. KAESTED. We haven't filed it yet but I am filing it now.

Mr. EDWARDS. I would like to file that with the Court and give this copy to Mr. Karsted.

Mr. KAESTED. Thank you.

Mr. EDWARDS. The second motion or group of motions has to do with the criminal case which is docketed as 6070. In that the Wallace & Tiernan defendants—if I may call them that—have filed a motion to dismiss the information and to preclude. That is supported by the affidavit of Mr. F. G. Merkel and on that an original brief has already been filed with your Honor a few weeks ago and the Government has filed a brief and at this time there is a reply brief to be filed by ourselves. I am in error about that: We had not received until this morning a brief from the Government in support of its position on that motion so there is no reply brief ready to file at this time. We will probably ask for a little extra time.

In that same criminal action, your Honor, I see from the docket that there are four other motions and with permission of counsel I will just mention them. There is a motion of Schutte & Koerting represented, I think, by Mr. Joslin to dismiss the information; motion of Hellge, Inc. to return and suppress certain documents, they being represented by Mr. Dulligan and Mr. Cross; and two motions of Fairbank, Morse and the defendant Worthley, those

motions being for severance and separate trial and to strike and dismiss the information. There are, therefore, in the criminal case five motions filed by four sets of defendants.

708 Turning to the civil case I think the only motions is that case were by the Wallace & Tiernan companies and related defendant. The first motion is a motion to dismiss for lack of jurisdiction over the person and also for improper venue. We filed an original brief on that. The Government did not file any brief at the time we filed our original brief because the Government was relying upon an order which was entered *ex parte* by your Honor under Section 5 of U. S. Code 15. But today the Government has handed us a brief on a motion which, although subsidiary in a sense to the motion I have just mentioned, is also on file—a motion on behalf of our defendants to rescind the order entered by the Court *ex parte* under 15 U. S. Code, Section 5. There are these two motions but they can properly be considered together and raise the problem of the jurisdiction and venue in the civil case over the Wallace & Tiernan companies.

That is a long recital but there is still one more. In the civil case there is also a motion for a bill of particulars and we have filed our original brief on that and the Government has likewise, and this morning we are filing a reply brief—which I wish now to do—with the Court and the Government was served, I think.—Am I right, Mr. Karsted?

Mr. KARSTED. No, there is no reply brief on the bill of particulars.

Mr. EDWARDS. We hope that means the Government
709 is convinced by our original brief.

Now, to recapitulate, your Honor, in the case docketed as Miscellaneous 5347, motion for return of photo stats, in the criminal case, motion to dismiss the information and to preclude and four other motions by the other defendants; in the civil case, a motion to dismiss together with an accompanying motion having to do with that order entered *ex parte* and a motion for a bill of particulars. The order that I have used I thought might be a good order in which to take up these matters if it was agreeable to the Court.

The Court. I have no objection to anything you gentlemen agree upon as to the order.

Mr. EDWARDS. For our people Mr. Tuttle, who has been before your Honor before, was going to argue the first two.

the motion for return of photostats and the motion to dismiss the information in the criminal case; and the two motions or groups of motions in the civil case I was going to argue briefly although I think a good deal of that can be submitted on briefs and we have no formal agreement with other counsel in the case, your Honor, about where they should be heard or when your Honor would like to hear them. I should think perhaps that after Mr. Tuttle has argued the motion to dismiss the information in the criminal case—the second of the motions he is going to argue—it might then be an appropriate time before we took up the the civil case to have the other criminal cases argued.

710 There are so many counsel involved here we had not made any formal arrangements, because we all thought it was better to take it up with your Honor this morning at this hearing.

The Court. Let me ask, first, is there any objection on the part of the Government to the motion to return the photostatic documents in the possession of the United States?

Mr. KELLEHER. There is, your Honor.

The Court. All right. Well, Mr. Tuttle, you may proceed then.

Mr. TUTTLE. If the Court please—

The Court. Mr. Tuttle?

Mr. TUTTLE. During the period that the documents, which were produced here compulsorily under subpoena, were impounded here and before the dismissal by your Honor of the alleged indictment as not due process of law for constitutional reasons in view of the invalidity of the composition of the Special Grand Jury, the representatives of the Attorney General, having under the impounding order access to the original documents so produced, utilized their opportunities to take a large number of photostatic copies, pictures of the originals, thereby retaining in their possession, as they intended, the equivalents of the originals. Your Honor made an order on the same day as you dismissed the indictment directing an immediate return of the documents pursuant to our motion for their return and they were returned that day with some exceptions which were

711 subsequently supplied. However, they did not return the pictures which they had taken of the originals and those pictures they, as the representatives of the Department of Justice, are proposing to retain as the representatives of the Department, not as the representatives of the Court, not as the representatives of the Special Grand

Jury or any other Grand Jury. We demanded their return both orally and by letters and that return has been refused; hence, our motion.

The motion is based upon, first, the obvious consideration that the Department cannot do indirectly what it cannot do directly; second, your Honor has directed the return of the originals. That order has been complied with and it never has been appealed from and, in consequence, the principles which underlay that order have now become settled law as between the United States on the one hand and these defendants on the other. And, in the third place, the authorities both of the Supreme Court and in Federal courts throughout the land have settled one of these principles clearly and that is, specially, that where the Department of Justice has acquired illegally, unconstitutionally, and without due process possession of original papers belonging to a private citizen. It can be required to return those originals plus any incidental copies which, during the illegal possession or access of the Department, were made by the Department on the theory which is common sense that the "tail goes with the hide;" and since they had no right to take possession of the originals, they had
712 no right to perpetuate that possession by the method of taking photostats of the originals.

Now, in view of certain statements made in the opposing brief submitted by the Department, I want to review very briefly certain facts of record because those facts of record constitute, in my judgment, a complete answer to their proposition and also because their brief, as I view it, seeks to argue this matter on hypotheses which are fictional and which can have no existence in view of the record in the case.

Their chief contention seems to be that these subpoenas were the subpoenas of the Court and not of the Grand Jury; that the Court had general power to issue subpoenas; and that, therefore, our attack on the situation is really an attack on the exercise by the Court of the lawful power irrespective of the invalidity and unconstitutionality of the Grand Jury. I say that is fictional as a premise and the conclusion which the Department seeks to draw from that premise is also indefensible.

In the first place, it isn't the Court that is seeking to retain these photostats. The Court has entered no order impounding the photostats and there is nothing in the law by which the Court could enter such an order and there is.

nothing before the Court in which such an order could be entered even if the Court had the power to enter such an order. The subpoenas, whether you regard them as Court subpoenas or Grand Jury subpoenas,—to yield just
 713 for the moment for the sake of argument to the nice distinction between terminologies which the opposing brief seeks to draw—have all fallen. They failed when their purpose failed and they had but one purpose declared in their very contents: to wit, the bringing up compulsorily of certain papers before the Grand Jury for the use of the Grand Jury and incidentally for the use and examination of the representatives of the Attorney General as the appointed assistants of the Grand Jury. Therefore, I emphasize that the conclusion doesn't follow irrespective of the invalidity of the premise. The conclusion doesn't follow because it is the Department of Justice that is seeking to retain these pictures. It is the Department of Justice that is seeking to perpetuate its possession of these pictures after the Court has withdrawn from the original relationship which the Court had in the issuing of the subpoenas and after the Grand Jury had disappeared pursuant to your Honor's order. So that what the Department is really trying to draw from its fictional premises is the conclusion that by some manner or means, although its access to these papers was wrongful and it was required to return the originals; nevertheless, it may indefinitely and forever retain its pictures taken by it during the illegal possession and during the illegal access which the Department had—may retain these forever for any purpose which it sees fit, including, doubtlessly, the purpose of using them at the trial if any trial takes place. So much
 714 for the conclusion which they see fit to draw. A water can't rise any higher than its source and if its source is polluted, what water comes out of that source is also indefensible for use. But the premises are also, as I say, fictional and erroneous.

To demonstrate those premises are fictional and erroneous, I wish to call the Court's attention to certain facts of record. These subpoenas were issued in the spring and summer of 1946. They say in the opposing brief that we could not at the time have attacked the validity of the Grand Jury. They make that as a concession and, for the purposes of my argument and those purposes only, I will accept that concession. They cite cases to demonstrate why they make their concession, cases by the Supreme Court holding that where a person is in position merely as

a witness, the jury character of a Grand Jury cannot be challenged as long as the Grand Jury is sitting *de facto* and is recognized by the Court as a *de facto* body under the supervision of the Court; that that right can come into being only when the witness is subsequently converted into a defendant.

The Court will bear in mind, of course, that while we were witnesses we struggled against these subpoenas. We did whatever witnesses could do up to the point where, as good citizens, we were afraid of pushing ourselves into contempt of court. The authorities all hold—and nobody disputes them—that the yielding to such subpoenas is a yielding under compulsion.

715 The moment, however, we were converted from witnesses into defendants we did proceed to challenge the constitutionality of the Grand Jury and to demand our papers back on the ground that the subpoenas, being an aid of this Grand Jury, did not constitute due process. I cannot understand, sir, the distinction which they are trying to draw in terms of terminology between a subpoena as a process of the Court and an investigation by a Grand Jury as a process of the Court. That is not only a splitting of hairs but it is a wrongful splitting of hairs because there is no hair to split.

These subpoenas were entitled, "*In Re* Special Grand Jury Proceedings." The body said:

"YOU ARE HEREBY COMMANDED to appear before the Special Grand Jury of the District Court of the UNITED STATES for the District of Rhode Island * * * and that you bring with you and produce at the time and place aforesaid—to wit, before the Special Grand Jury—these "papers" * * * and to testify concerning certain matters under investigation by the Special Grand Jury * * *

On May 28, 1946, Mr. Karsted, as Assistant Attorney General, filed an application with this Court for the impounding of these documents as they were being brought up or about to be brought up, and in that he said:

"On April 29, 1946, subpoenas *duces tecum* were issued by the Clerk of this Court on behalf of the Special Grand Jury now sitting for the District of Rhode Island * * * commanding the parties so subpoenaed to appear before the Court and to bring with them certain specified documents."

715A Then he said and I quote:

"Said subpoenas *duces tecum* call for a large number of documents which cannot be presented to the Grand Jury in an orderly manner or intelligently understood and evaluated by the Grand Jury without detailed and careful organization of said documents by the duly authorized Attorneys for the United States who have been appointed to aid and assist the said Grand Jury."

And then he said:

"That said organization and arrangement will require constant access to the papers."

But he sought from your Honor and entered an order on June 3, 1946, impounding the documents. Your Honor said in that order:

"It appearing to the Court that large quantities of documents will be produced pursuant to the terms of said subpoena *duces tecum* issued in reference to matters pending before said Grand Jury . . ."

And you made certain other references which showed that your Honor realized that these subpoenas were not issued in a discovery and inspection proceeding by the United States; that they were not the process which is issued in a discovery and inspection proceeding which would have been a civil proceeding; and that they were not being brought up by the Court for its personal inspection or its personal use because there was no proceeding which would justify that. They were being brought up at the instigation of the Grand Jury, as your Honor said

at a later moment and as I will quote: "for its purpose and for inspection by the Department of Justice as the agents of the Grand Jury designated by the Grand Jury for the purpose."

So we made our motion on March 19—just before March 19, 1947,—and on that memorable day there were decisions by your Honor both on our motion to dismiss the Grand Jury and for the return of the documents. On the former motion your Honor concluded your opinion by saying:

"It, therefore, seems that in the interest of justice this Court, in view of the Ballard and Zap cases, is in duty bound to grant the motions of the defendants in these cases. The defendants' motions to dismiss are granted, and it becomes unnecessary for the Court to consider other grounds alleged in the motions. The defendants are discharged and the bail is discharged."

An examination of the Ballard and Zap cases shows that in one, at least, or both of those cases the decision of the

Supreme Court was rendered even after a conviction, and the opinions of the Supreme Court show that because of the unlawful constitution of the Grand Juries in those cases the Court determined that whatever proceeded from the Grand Jury was not due process within the meaning of the common law and also of the Constitution of the United States.

From all I gather from those opinions, the same result would have been arrived at even if the Supreme Court had confined itself solely to the common law and the statutes passed by the Federal Government and by the

747 State of California. In other words, for both reasons the taint in the matter was not an irregularity, not merely a violation of directory law, but it was the absence of due process and that was the ground of our motion and I take it that was the ground of your Honor's decision.

At the same time we presented our motion for return of the documents and on the same day, March 19, 1947, your Honor entered an order saying:

"That the documents listed in said motions be, and they hereby are, made available to the defendants forthwith for return to them;

"That the orders of impounding described in said motions be, and they hereby are, vacated and rescinded."

In the colloquy that ensued we have some important statements bearing upon this subject as a matter of record both from your Honor and from the learned Assistant Attorney General, statements on his part, at least, that are directly contrary to this belated afterthought that somehow or other—I resort to terminology—a distinction can be drawn between a subpoena *duces tecum* as a process of the Court on the one side and an investigation by the Grand Jury as some other kind of process of the Court.

After I had presented my motion for return of the documents, your Honor said in court:

"Do you, Mr. Karsted, raise any objection to the granting of this motion?

718 "MR. KARSTED. Yes, your Honor, the Government wishes to object to that motion.

"The COURT. On what grounds?

"MR. KARSTED. On the grounds that although the Grand Jury is dismissed and although the documents were originally brought in pursuant to a Grand Jury subpoena,

his present terminology had not come to him at that time but he was speaking in terminology which fitted the facts—

“the documents are now in the possession of the Court and are impounded by the Court.”

to which the Court replied:

“The Court got them as a result of an illegal process.

“Mr. KARSTED. That is right, your Honor, but the authority indicates it doesn't make any difference how the documents were gotten if they are impounded in the possession of the Court and the Court deems it to the public interest.”

to which the Court replied:

“* * * When there are documents that grow out of a Grand Jury process * * *—

and your Honor was again using terminology which fitted the facts and not the fiction—

“* * * When there are documents that grow out of a Grand Jury process that has now been held to be an illegal Grand Jury, doesn't everything that belongs with it become tainted with that illegality?”

And then at a later point your Honor said:

“Yes, but aren't they”—that is, the documents—
719 “impounded as a result of what has happened through the Grand Jury? That has nothing to do with the civil case, has it? As far as this Court is concerned, Mr. Karsted, isn't the fact the same as if it was never in here, for all purposes, at the moment?”

I think by the wording your Honor referred to the impounding order. Mr. Karsted said:

“That might be right.”

Then your Honor immediately said:

“There is nothing before the Court that these papers that were impounded appertain to, is there, as far as this Court is now concerned?”

“Mr. KARSTED. Not if the Grand Jury is dismissed.”

The same thing, of course, applies necessarily to any uses which the Department of Justice made of the opportunities which the subpoena *duces tecum* and the impounding order created for it.

Now they are attempting in their brief in effect to re-argue our motion for the return of the documents. They don't say so in so many words but they put forward principles and contentions which, if sound, would have justified the Department's indefinite retention of the originals just as now they are using those same arguments and conten-

tions to justify the retention of the equivalents of the originals.

Overlooking that, although your Honor, at various times during the course of that momentous discussion on March 19, 1947, suggested that in the interest of 720 ultimate clarification of the law an appeal might be taken, they never took an appeal from either the order dismissing the Grand Jury or from the order directing the return of the original documents. I presume it would be fair to imagine that that decision not to appeal either one of those determinations was a matter of grave consideration to the Department of Justice and they came to the conclusion that the principles which your Honor spoke of in your extended verbal opinion were sound in view of the absence of due process as settled in the Ballard and Zap cases and that, therefore, the orders were right. They were not only right but now they have become *res adjudicata* as between the United States and these same individuals and corporations. Those principles have become the law of the case and the Department of Justice cannot, for its purposes, evade them or escape from them or seek to re-argue them simply by saying in effect: "Well, the principles underlying the decisions are really wrong."

If you will now let me, after bringing before you the record, go to some of the authorities briefly. Is there such a thing in law as the absence of a right on the part of the Department of Justice, after the retirement of a Grand Jury, to retain photostats which it has taken of original documents belonging to a private citizen when the Department would have no such right to retain the originals? 721 Is there any such distinction in the cases? The cases say there is not.

Now in my main brief—our main brief—on this matter, we have cited half a dozen decisions—one of them by the Circuit Court of Appeals in this very circuit—all of which stem from the leading decision of the *Silverthorne Lumber Co.* case in the Supreme Court of the United States, 251 U. S. 385. There, there was much more to be said for the position taken by the Department of Justice in its effort to retain its copies than can possibly be said here.

In that case there had been an indictment of two persons by the name of Silverthorne in the Federal Court, and after that indictment came down, representatives of the Department of Justice went to the Silverthorne Company's office—these two Silverthornes who were indicted being officers of

the Silverthorne Company—and there they made what Mr. Justice Holmes describes as a clean sweep of all the books, papers, and documents found there. In other words, there was an illegal seizure.

The Department of Justice then proceeded to take photographs of the papers so seized and on the basis of the seized papers and on the basis of the photostats which they made from them, the Department of Justice framed a new indictment based upon the knowledge thus obtained.

Your Honor will see the parallel here because in this particular case that is here the indictment was no sooner dismissed than the Department of Justice turns around on the basis of the same papers, records, and information that it obtained from them and files what it terms an information verbatim the same as the indictment. So the parallel with the Silverthorne case to this point is complete.

The Silverthorne Company, as soon as it found that this clean sweep had taken place, made a prompt motion to compel the return of all the papers thus seized and all copies thereof. The District Court in that case made an interesting decision because it drew the Department's desired distinction between the originals and the copies made by the Department. It ordered the originals to be returned but refused to order the return of the copies or to suppress the use of the information.

Thereupon, the Department issued a new subpoena for the bringing up of the originals which it had been ordered to return and the Silverthorne Company refused to comply with the subpoenas and was put into contempt of court, and the matter went on appeal from that order of contempt to the Supreme Court of the United States and there Mr. Justice Holmes, speaking for the Court, used some of his very characteristic caustic language in analyzing the attempted distinctions which the Department was seeking to draw and all of which amounted to nothing at all except what Judge Holmes describes as the naked proposition that the Department of Justice out of a wrong can come into possession of a right and thereby evade what the common law holds concerning due process and what the Federal Constitution holds concerning due process.

He said:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study

the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession and not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. * * * In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. * * *

And in the course of that opinion Mr. Justice Holmes approved the *Flagg* case which your Honor now sees further down on that page, a decision in our New York 2d Circuit, and Judge Holmes' language was that the principles announced in the *Flagg* case are satisfactory. That was the bold case of an illegal seizure, the making of copies, and then the frantic effort to maintain possession of the copies; and the Circuit Court of Appeals held that all must be returned, both the originals and the copies.

The *Rogers* case, which is over on Page 9 of our original brief, is a Circuit Court of Appeals case in the First Circuit on a matter coming up from the Rhode Island U. S. District Court; and the Circuit Court of Appeals 724 followed the *Silverthorne* case and applied it; and your Honor will see on Page 9 what the Circuit Court of Appeals said concerning the *Silverthorne* case.

It seems to me, therefore, that I can conclude this branch of my discussion of this motion by just rehearsing the following reasons why the distinctions which the Department of Justice seeks to draw here cannot be accepted. In the first place, there is no such thing here as a subpoena issued for the Court's own judicial purposes. There was no such proceeding. There was no discovery and inspection proceeding. The Court was simply signing, at the instigation and for the purposes of the Grand Jury and at the request of the Department of Justice, a subpoena which would bring up certain papers for the use of the Grand Jury and incidentally for the use and inspection of the Department of Justice, as the agent appointed by the Grand Jury to organize the papers and bring them forward. That is the reality of the situation so declared judicially, so admitted, on March 19, 1947.

In the second place, your Honor said very properly in that discussion that when the foundation was taken out from under the building, the whole building fell. In other words, the basic fault was the absence of due process and anything that was done in the course of the action taken by the Department in pursuit of undue process was tainted with that same illegality. That is not only law but it is

725 logic because the Department of Justice can't assert a right to make the photostats except on the basis of asserting its right to have the possession and the opportunity to make the photostats. And not having that right, that basic right, it couldn't impinge those opportunities and lift itself by its own bootstraps and give itself a right when it was proceeding wrongfully.

In the third place, I have already pressed upon your Honor what I regard as really, quite aside from anything else, the conclusive action. This situation has become *res adjudicata*. The principles underlying your Honor's decision cannot now be questioned and that being so, they can't do by indirection what they were held not to have the right to do by direction.

And I know, fourthly, of no process whatever, no proceeding by way of law which has taken place in this court whereby the Department of Justice as the Department of Justice can get a power in this situation which it can call up to retain either the originals or the copies, for its purpose, in its possession after your Honor has dismissed the criminal proceeding and after the Grand Jury has gone, particularly in view of the fact that the Grand Jury never legally arrived.

They make some effort here to present two new points which, without arguing, by way of anticipation, I shall at this point only refer to. These points state the same thing in two different ways; (1) they claim that we waived our right to make this motion. I am at a loss to see how

726 they spell that out. If we waived our right to make this motion, we certainly had waived our right to make the motion to return the originals. That was the basic motion and that motion carried with it as a corollary our right to have the photostats back. So that their effort to say we waived our right to have the photostats, although they never claimed that we waived our right to have back the originals, is again a resort to splitting hairs when there is no hair to split. They say in New Jersey, when there was a lawful Grand Jury subpoenaed by a

lawful Grand Jury, we accepted the offer of the Attorney General to assist us in getting together the papers for production before the New Jersey Grand Jury. Therefore, they seem to say that because we accepted the assistance of the Attorney General in identifying certain papers for production before a lawful Grand Jury pursuant to lawful process, by some, to me, incomprehensible jumping from premise to conclusion, we forever waived any right to protest anything the Department of Justice did as to any papers of ours anywhere.

The COURT. What has this Court got to do with the New Jersey situation?

Mr. TUTTLE. Nothing, and I only mentioned it because points (2) and (3) of their brief are devoted to it and if I have to make any rejoinder, I shall ask your Honor's permission after they have concluded that.

Now I have served a reply brief—I think it has been filed with your Honor—so you will have from

727 me on this motion both a main brief and a reply brief.

The reply brief is devoted mainly to these distinctions of terminology which the Department of Justice is trying to set up.

I will proceed if your Honor thinks it appropriate to argue our second motion.

The COURT. I would think, Mr. Tuttle, it would be better if I heard the Government on this first, reserving your right to proceed later. It would seem to be clearer for all of us.

Mr. KELLEHER. May it please the Court, the motion before your Honor this morning, I submit, is not simply to obtain from the possession of the Department of Justice its photostatic copies of the documents impounded by your Honor as the result of a Grand Jury investigation. The swath of this motion, your Honor, cuts far wider. In substance and out of the basic necessity of the defendants' argument, the contention is that by reason of the unlawfulness of the Grand Jury, by reason of the inspection which the Government made of the documents presented to that Grand Jury and subpoenaed under process of this Court, that by reason of that the defendants have gained complete and absolute immunity from prosecution in this case.

I say that necessarily falls for this reason. Admittedly, the defendants' sole authority for their motion here is the decision in the Silverthorne case. That decision

728 held that because there had been what Mr. Justice Holmes characterized as an outrage performed

by the Government, the Government would be forever precluded from using either the documents obtained through the perpetration of this outrage or any knowledge or any information gained as a result of its inspection of those documents. That is the law in the Federal courts.

With that issue the Government has no quarrel provided, however, there is reason for your Honor to conclude that there has been an unreasonable search and seizure within the meaning of the Fourth Amendment to the Constitution. If there has been an unreasonable search and seizure, your Honor, it goes without saying that the Government is precluded from using these documents; that the Government must also surrender not only its photostatic copies but the notes made by it—all information upon which the Government largely bases its prosecution here.

I think it is important for your Honor to bear that in mind to realize precisely what the issue is. It is: Has there been, by reason of the method by which this Grand Jury was impaneled, such an unreasonable search and seizure so that the Government is forever precluded from prosecuting these gentlemen, these corporations, and these individuals named in the information now before the Court?

Now Mr. Tuttle has made much of your Honor's opinion upon the application of the defendants for release from the impounding order which your Honor had signed, impounding the documents produced pursuant to the subpoenas issued last year. I was not present during that argument but I understand that it was taken up at the conclusion of the main argument which was before the Court relating to the lawfulness of the Grand Jury. I have examined your Honor's statements. It was my conclusion that your Honor felt that the impounding order should be dissolved because there was no proceeding pending before the Court which warranted your Honor in further impounding those documents. I certainly did not understand that your Honor concluded that by reason of the unlawfulness of the Grand Jury you felt that the prosecution must drop to the extent that it depended upon those documents.

If your Honor intended to conclude that there was a violation of the Fourth Amendment to the Constitution in the subpoenas issued, then I respectfully request that there be a reconsideration of the entire matter so that we can fully argue the thing at length. As I say, my interpretation of your Honor's ruling—and Mr. Karsted's—was that

you felt within your discretion the impounding order should not be continued.

It is imperative, your Honor, that these defendants, to sustain their motion here, establish that there has been an unreasonable search and seizure within the meaning of the Fourth Amendment to the Constitution. That is so because it is only after there has been such an unreasonable search that the Government is forever precluded from using the knowledge which it gains as a result of that search.

730 It is only in those instances, as the authorities for the defendants themselves show, that a court has ordered the Government to surrender its own notes, its own photostats. The purpose of the rule of the Silverthorne case, in other words, is to prevent the Government from taking advantage of a wrongdoing which it committed in violation of the Fourth Amendment to the Constitution.

Now Mr. Tuttle and the defendants in their brief gently cross over the issue of whether there has been an unreasonable search. They would lead your Honor to believe that the law is that every wrongful act involved in a search and seizure makes the search a violation of the Fourth Amendment. Fortunately the Supreme Court of the United States has only last year held otherwise in the decision of *Zap*, *United States*—a later Zap case, your Honor, a decision in which the Supreme Court stressed the fact that not every wrongful act by the Government constitutes an unlawful search and seizure so that at the outset of this issue then it is essential that the defendants establish not merely that there has been some illegal action in the Grand Jury proceedings but that that action is tantamount to an unreasonable search.

Our contention is that the defendants in their position ignore a fundamental distinction, the distinction between the process of the Court and the proceedings for which the process is issued. I say the distinction is vital.

731 In summary I say that the only thing aimed at by the Fourth Amendment to the Constitution is process; that the Fourth Amendment to the Constitution is not concerned with the lawfulness of the proceedings for which the process is issued. I say that for two reasons. First, based upon the very language of the Constitution. The Fourth Amendment provides that:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Under early English law the pertinent decisions of the Supreme Court of the United States show that there was even some doubt as to whether there could ever be a reasonable search. For example, Lord Coke is said to have held at one time that a search warrant might not issue even for the recovery of stolen goods. Be that as it may. Later English law developed so that by the time of the drafting of the Constitution it was recognized that there might be a lawful search and seizure. The Fourth Amendment was intended to preserve the right of the Government to indulge in such a lawful search and seizure.

But what did the Fourth Amendment do? It set forth the procedure, the process which must be used by the Government if a lawful, a reasonable search and seizure was to be undertaken. It provided that there must be, 732 first, a warrant—a warrant upon which a showing of probable cause had been made, a warrant supported by an oath or affirmation, and a warrant containing a required description, a particular description, of what was to be searched and seized. In other words, the very language of that Amendment goes to the question of what is the process, what kind of process may be used for a search and seizure which is reasonable.

Historically also it is clear that what the Fourth Amendment was aimed at was the use—was the conduct, rather, of a search and a resulting seizure without benefit of any process at all or with benefit of process that was so general that it was repulsive to American traditions. Your Honor is well aware of the fact that it was just prior to the adoption of the Constitution that the writs, odious writs of assistance, were being used by revenue officers to compel the production of documents; writs which gave to revenue officers a general authority to conduct searches in their discretion.

It was that practice which was the subject of Paxton's case decided in Boston in 1761, a decision which is celebrated by reason of John Otis' argument in which he contended that practice to be the most oppressive instrument of oppression ever found in any lawbook. He lost Paxton's case but as Mr. Justice Frankfurter has expressed it, the case was reversed by a higher court of resort; to wit, the Supreme Court of the United States.

733 The founders, draftsmen, of the Constitution were also familiar with the general warrants which were issuing in England about that time or some time prior to the drafting of the Constitution; general writs which had grown out of Star Chamber proceedings; writs which, in no way, described what was to be searched and seized; writs which had no judicial sanction but were issued by the Secretary of State. The founders undoubtedly had that in mind, as the Supreme Court has repeatedly suggested. They had in mind the decision of *Entick v. Carrington* in which Lord Camden held that such general writs were unconstitutional under British law, a decision which the Supreme Court has characterized as a monument of English freedom.

My point is this, if the Court please: The language of the Constitution—its history—shows that the constitutional protection was designed to ensure that there should not be, as Justice Frankfurter has stated it, police access; that the privacy of a man's home, his business, his papers, and his effects shall not be invaded without appropriate process; and that process, I say, is that defined in the Constitution.

Indeed in *Weeks v. the United States*, the Court in summarizing what the purpose of the Amendment was stated that it enunciates the principles that a man's house is his castle and not to be invaded by any general authority to search and seize his goods and papers. That then is what the Fourth Amendment protects against—a use of no warrant at all—or against a general warrant which is
734 ~~similar to the type of proceedings which were so~~
repugnant to the founders of this country.

As a result of that, your Honor, where there has been an unreasonable search—an actual search and seizure—the decisions of the Federal District Courts, of the intermediate Appellate Court, and of the Supreme Court of the United States all involved instances either of a search made without any warrant at all, as in the *Silverthorne* case, or a search made by a warrant which did not comply with the standards established in the Fourth Amendment. Those are the only type of case, where there has been an actual search, where the Fourth Amendment has been invoked against the Government.

Now let's examine this case. There, of course, was actually and literally speaking, no search and seizure. When the Grand Jury was impaneled here

The COURT. That goes without saying—no search and seizure. But there was a search, wasn't there, as the result of a process of this Court, of papers that these defendants didn't have to show the Government if they didn't want to?

Mr. KELLEHER. But we didn't invade the privacy of their business.

The COURT. Didn't you invade it under an order of the Court?

Mr. KELLEHER. That is right. It is what Mr. Justice Rutledge characterizes as a constructive service.

735 The COURT. Aren't you splitting hairs?

Mr. KELLEHER. I don't think so, your Honor, because I would like to go this far with you. It isn't a substantial point to this extent. I don't mean it isn't important for your Honor to distinguish the fact that there has not been an entry into the defendants' actual premises.

What Mr. Justice Rutledge said in the *Oklahoma Press* case is this: That the doctrine against unreasonable searches and seizures is applicable to subpoena power only, not against an analogical sense since there has been no actual invasion of the homes or business of the parties subpoenaed. He says what the courts have done is to grant a very liberal interpretation to the Fourth Amendment and to hold that it applies not only to those cases where a person or police officers enter premises but also to those instances where a subpoena issued by judicial process—pursuant to judicial process—requires the production before a tribunal of documents of the defense.

He points out that in those instances where a corporation is involved—of course, the Fifth Amendment against self-incrimination can have no application—that the Fourth Amendment, he says, is applicable only in a very limited sense; that its only application is this—and I would like to quote from the opinion of the Court:

736 "Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, insofar as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction"

The COURT. "Authorized by law."

Mr. KELLEHER. An "order authorized by law". I will come to that, your Honor.

" . . . or order authorized by law and safeguarded by judicial sanction"

I might interrupt parenthetically. And the subpoena involved in the Oklahoma Press case was the subpoena of the Administrator of a Fair Labor Standards Board and the question was whether an administrative subpoena of that kind could be issued by the Administrator without violating the Constitution of the United States. The provision of law under which the subpoena was issued provided for enforcement of the subpoena by the Court. So that is the reference there. That is the meaning of the Court, Mr. Justice Rutledge, when he says:

“... subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provisions, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described,’ if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.”

The Court. In this case the demanding agency was authorized, wasn't it?

737 Mr. KELLEHER. I want to meet that squarely, your Honor. Before I do that, I would like to dispose of the two other points; first, the issue as to whether the subpoenas embodied too much indefiniteness or the question of relevancy. I don't think there is any dispute that issue was disposed of by your Honor's decision in the motion to quash in which the defendants invoked the Fourth Amendment. At that time your Honor held the subpoenas were sufficiently definite to require defendants to comply and there was no violation of their rights under the Fourth Amendment in that respect.

Now at this point I would like to address myself to the point which your Honor has just made, and that is the question of whether the inquiry was one that the demanding agency could make.

The Court. Perhaps, Mr. Kelleher, it might be a good time to take a recess.

(Recess.)

Mr. KELLEHER. May it please your Honor, at the recess I had reached the point where I believed I could demonstrate—hoped to demonstrate—to your Honor that the process of the demanding agency, within the meaning of Mr. Justice Rutledge's opinion, is in accord in this instance. I think it is important to bear in mind the Court—

The COURT. The Court?

Mr. KELLEHER. The Court wants them for a particular proceeding; to wit, a Grand Jury proceeding, but it is my contention that the only power of a Grand Jury to obtain either the appearance of witnesses or the production of documents before it is by invoking the process of the Court. The Court issues the subpoena. Every subpoena, as I understand it, which went out in this investigation, bore your Honor's name.

On authority it has been held in the *National Window Glass* case, which we cite in our brief, as follows:

"The process by which witnesses are compelled to attend a grand jury investigation is the court's process and not the process of the grand jury, nor of the district attorney."

Historically, the right of the Court to issue a subpoena to compel witnesses to attend or to require the production of documents developed entirely independent of the institution of the Grand Jury. The first statute is a statute in Britain. The first known statute cited by the Supreme Court is a statute in Britain in 1561 in which, for the first time, by statutory requirement, witnesses were compelled to attend investigations or hearings by the Court; and the history shows, as reflected by the opinion of the Court in the *Blair* case, that this process of the Court was later utilized to obtain compulsory production of documents and appearance of witnesses before the Grand Jury. In other words, the process is the Court's process. The proceeding may either be a trial proceeding or a Grand Jury proceeding. For example, the statute of the United States—

739 "The COURT. Assuming for a moment it is a legal subpoena of the Court, has the Court a right to order somebody to go before an illegal body and produce the papers mentioned in that subpoena?"

Mr. KELLEHER. My point is this: The Court has the right to order the investigation in this instance. There is no question about this Court's right to order an investigation of these companies to determine whether there had been a violation of the Sherman Act.

The COURT. Investigation by whom?

Mr. KELLEHER. A Grand Jury.

The COURT. What kind of a Grand Jury?

Mr. KELLEHER. A lawful Grand Jury.

The COURT. This wasn't a lawful Grand Jury.

MR. KELLEHER. I say that is what the Court has. That is what the Court does when it issues its subpoena. In other words, that subpoena—The test is, first, is that subpoena sufficiently narrow? And, secondly, does the Court have the power to issue that subpoena? The Court has the power to issue that subpoena itself because it has the power to order a Grand Jury investigation.

THE COURT. A legal Grand Jury investigation.

MR. KELLEHER. Yes, your Honor, but I say considering your Honor's power, which is what we look to, which is the test Mr. Justice Rutledge stated should apply—the power of the demanding authority—your power is to subpoena those documents for an investigation. I submit 739A that once you find that your Honor has that general power, the test as to compliance with the Fourth Amendment to the Constitution is met.

Thereafter, the test, of course, is whether the proceedings before which the documents are produced may be illegal but I say that does not bear and cannot bear upon the appropriate use of the process of the Court because the Court has the power to subpoena the documents.

Now, your Honor, I point this out. What is the net effect of the defendants' contention if your Honor reaches any other conclusion? Under the doctrine which, counsel has conceded, controls in the Federal courts, under the doctrine of the Wilson case, a witness may not attack the regularity of a Grand Jury. These gentlemen, these companies, when they were subpoenaed, could not, under their position, come in and attack this Grand Jury because it did not have women included within it or because women had been excluded. Under the holding of the Supreme Court of the United States they have no standing to do it. On the other hand, as is perfectly clear from what happened in this case, they can attack the subpoena. They can attack the process of the Court. So it seems to me to follow necessarily from that holding that if a witness can invoke the Fourth Amendment to the Constitution, so far as a subpoena is concerned, but cannot do so with respect to the jurisdiction and the competency of the tribunal which 740 hears the evidence, then it would seem necessarily to follow, if it please the Court, that the Fourth Amendment—the scope of the Fourth Amendment—is limited to the process which is used to compel the appearance of the witness; that it does not apply to the proceedings, to any error in the subsequent proceedings, be-

fore which the witness must appear or produce his documents. The net effect of any ruling such as the defendants request would be to give a witness the very standing—the very standing—which the Supreme Court in the Wilson case has held he is not entitled to.

The COURT. Here they are the defendants.

Mr. KELLEHER. It doesn't help, as I say, to point out that these parties are now defendants. Any person has a right at any time to invoke the Fourth Amendment to the Constitution when he is compelled—the Fourth or Fifth Amendments to the Constitution—and the law is he must invoke them at the first opportunity. So in the Fourth Amendment to the Constitution applied in this case, then I say we would not have the rule of the Wilson case. The rule of the Wilson case clearly demonstrates, I say, that what the Fourth Amendment is aimed at is the particular process involved: either a search warrant or its absence or a subpoena. So long as a witness confines his attack to that, then he is permitted to do so. He is permitted to do so because he can invoke his constitutional rights at any time. He is not permitted to attack the regularity of 740A a Grand Jury at that stage because no constitutional right of his is involved.

So I say that the net effect of any ruling by this Court in accordance with the defendants' argument would be to destroy that distinction which the Supreme Court has repeatedly insisted upon and which counsel, Mr. Tuttle, acknowledged is the law applicable in the Federal courts, as far as witnesses before Grand Juries are concerned.

In other words, the Court issues a process. The only inquiry then is has this Court a right to order an investigation of the kind which it has ordered? That is answered. The Court had a right to order Grand Jury investigations of violations of the Sherman Act. The next question: Is the subpoena sufficiently narrow so it cannot be said to be a general search which is opposed to the Fourth Amendment? And, finally: Is it relevant?

Every one of those issues might have been raised by these witnesses at that time but the rule of the Wilson case necessarily precludes them from raising them either at that time or at this time because the Fourth Amendment does not look to the particular proceedings.

I might point out another respect in which it seems to me would reach what almost amounts to an absurdity. I suppose that if the proceedings result in a trial, then if the trial jury isn't properly impaneled, the documents which

741 we have obtained through a lawful Grand Jury but which are submitted to an improper petit jury become tainted with that.

"The COURT. I don't follow that argument.

Mr. KELLEHER. It seems to me it must necessarily follow for this reason: Here is what we have here. We have a lawful subpoena; no question about that. What do the defendants contend has happened? They contend that when their documents have been produced before a Grand Jury which is unlawfully constituted, that taints the entire thing. It is like trespass of an issue. So that if you logically apply it, the same thing must apply right straight through our judicial proceedings.

I submit, your Honor, the logical place to cut it off is the place where, always in Supreme Court decisions, they indicate is the place. That is at the time of the seizure.

The process! What is the nature of the process? Does that process comply with the definition, as set forth in the Fourth Amendment to the Constitution and cases thereunder? Otherwise, if you apply this logically, almost every error along the proceedings, from the time of Grand Jury to the last court, might be claimed to have tainted the procedure by which we obtained our documents.

I submit that the only reasonable place to draw the line, therefore, is that which I have suggested: a consideration of the nature of this subpoena. Was the subpoena appropriate? So long as it was, so long as this Court had power to order an investigation, that met the 742 Fourth Amendment. True, there may well be other errors and there were in this case. I would, however, like to point out that Mr. Tuttle's statement and the intimations in the briefs that there was any violation of the Constitution at any time in these proceedings seems to me to be erroneous.

I don't understand that either the Ballard case or your Honor's decision in this case—a decision which, very frankly, the Government felt was correct—We don't feel, don't understand, that those decisions held that there was a violation of the Constitution. They simply held that this Court had not complied with a requirement of a Federal Statute that the laws of the State be adhered to in impaneling juries. The statutes of this State apparently, as your Honor construed them, seemed to construe them in the light of the Ballard case required that women be included in the panel. The violation of law, despite the broad claims

of lack of due process, was not a violation of the Constitution. It was a violation of the statutes of the United States.

Look what the defendants do now. Here we have a lawful subpoena. Here we have a violation of law which does not approach constitutional level. They combine the two and they say, by some sort of legal legerdemain, the combination of the two rises a violation of law of constitutional stature.

I submit in summary that all your Honor is concerned with in determining whether the Government must return its photostats is whether the subpoena was lawful. This Court has held that it was so that decision has been made. There is no further inquiry required as far as the Fourth Amendment is concerned into the various proceedings for which the documents were produced. That remains.

The COURT. Mr. Kelleher, if the Court's order, ordering the originals returned, were correct, you haven't given me any reason yet why the Government should keep anything that grows out of the originals.

MR. KELLEHER. Your Honor, as I understand it—I may be incorrect but I did not understand your Honor was holding that the originals should be returned because there had been a violation of the Fourth Amendment.

The COURT. They were ordered returned as the result of an illegal agency getting hold of them.

MR. KELLEHER. As I understood it, I thought the reason was in substance that there was no Grand Jury sitting here now which would warrant your Honor's exercising such a discretion.

The COURT. I don't know why the Court, at the time, if motions had been made for the return of photostats, should grant a different ruling than that made by the Court.

MR. KELLEHER. Yes, your Honor, I should think so. I, of course, quite frankly don't agree with your Honor's ruling in letting the documents go but I say this:

744 The impounding order—the order impounding the documents—is a discretionary matter with your Honor. I thought your Honor reached the conclusion that since these documents had been produced for a Grand Jury and impounded for that Grand Jury, and since it was found that that Grand Jury was unlawful and was no longer sitting, and since the necessary effect of your Honor's ruling was to knock out the pleading which had been returned by the Grand Jury, that there was no litigation before the Court; and since there was no litigation before the Court,

there was no reason for your Honor to continue the impounding order.

Now let me address myself to the photostats. Unless your Honor concludes there has been a violation of the Fourth Amendment to the Constitution, the defendants aren't entitled to our photostats. That is the only situation in which a court invokes its power to compel the Government to return its own notes and documents. The reason the court does it is because the court will not allow the Government to profit from a violation of the Fourth Amendment to the Constitution, but the court will never take the position that merely because there has been a wrongdoing in a particular proceeding in which, incidentally, the Government has had no substantial part, that there is any rational reason for compelling the Government to turn over its own property.

The COURT. How did you get the property?

745 Mr. KELLEHER. We got it by inspecting these documents, documents which, we contend, were properly before the Court for a Grand Jury investigation.

The COURT. They were properly before the Court, as far as the Court knew at that time what the law was; but when the Ballard and Zap cases came down—

Mr. KELLEHER. That isn't my position. My position is this Court had the power to order the production of those documents for a Grand Jury investigation.

The COURT. An illegal Grand Jury? This Court hasn't any right to subpoena documents except for some proper purposes. The proper purpose there was for a legal Grand Jury but it turned out to be—

Mr. KELLEHER. This gets back again to the point I made earlier. I don't think the test of whether the production is made should depend upon whether the particular proceeding is lawful.

The COURT. You haven't made it clear to me yet, Mr. Kelleher, what right the Government has to retain photostats of something that has been ordered returned because the investigation was illegal.

Mr. KELLEHER. Your Honor, I put it on this ground: I put it on the ground that your Honor must find a right to compel us to surrender our photostats. Where does that right lie? That right of the Court thus to act lies on authority only in those instances where there has been an unreasonable search and seizure. Those are the only
746 authorities that the defendants invoke. In other words, you must find that there has been an unrea-

reasonable search and seizure before you can order us to surrender the documents.

The Court: Isn't an illegal Grand Jury in the nature of an illegal search?

Mr. KELLEIVER. That is the issue which I thought I directed myself to. We say no, it is not; that the test of an illegal search, by reason of the language of the Constitution, by reason of its history, by reason of decided decisions, is whether the process used is lawful. The process here was the subpoena. The process was that of the courts. Therefore, when you have a lawful process, the Fourth Amendment is complied with, and the Fourth Amendment does not require a court to look beyond the particular process to determine whether the proceedings also are lawful. The lawfulness of subsequent proceedings will rest on different statutes and on different constitutional considerations but the lawfulness of the process rests on the Fourth Amendment, and the Fourth Amendment, we submit, is addressed only to the process which is used.

I would like to address myself to the point of waiver because I think it is important in this case. I have already pointed out to your Honor that the Supreme Court has held in *Zap v. United States*, which we cite in our brief that not every wrongful act in the course of a search or seizure, 747 constitutes an unreasonable search or seizure.

The facts in the *Zap* case were these: The defendant was indicted for submitting a fraudulent claim to the Government based upon a Navy contract. That contract provided, as most war contracts did, that investigators of the Government might inspect the books and records of the contracting party insofar as they related to the particular contract. When this defendant was suspected of violating the law, agents of the FBI went into the offices of this company and inspected its records to obtain the evidence. They made a rather thorough search. The contract, of course, had no provision in it for permitting agents to take documents. One of the FBI agents came across a check for \$4,000, a cancelled check, which was highly material evidence in the case, and he wrongfully—as the Supreme Court assumed—took the check. It was turned over to the United States Attorney. The case was prosecuted.

The defendants objected to the introduction of the check on the ground it had been seized in violation of the Fourth Amendment. The trial court admitted the check and the

Supreme Court affirmed it, and the Supreme Court, on this ground, it said this: When the defendant company voluntarily permitted agents of the FBI to come into their files and examine them, that constituted a waiver of their rights under the Fourth Amendment to the Constitution.

748 The Court pointed out that it was, of course, true that the FBI agent was acting without authority and, presumably, even wrongfully in taking that check out of the offices. Nonetheless, the Court held that that wrongdoing by the special agent did not exalt the wrong to constitutional levels:

I submit that we have a situation here—even if your Honor were to hold that there has been an unreasonable search and seizure in the absence of waiver, I submit that we have a situation which is extremely close to that before the court in the Zap case. What has happened here? These proceedings, as your Honor knows, were commenced in New Jersey. They were commenced as a result of subpoenas which issued out of the trial court there—District Court there. The defendants themselves, Wallace & Tiernan Company, according to affidavits on file with your Honor, proposed that agents of the Government be sent to examine the files of W. & T., and that occurred. The description of what occurred, is set forth in an affidavit filed by Robert E. Marshall, who is resident counsel of Wallace & Tiernan. He describes the situation as follows: •

“In connection with this subject-matter, the fact is pertinent that the Department of Justice has sought and had access to the bulk of these papers for several years.

“On February 20, 1942, Mr. H. Douglas Weaver, a representative of the Small Business Section of the Antitrust Division of the Department of Justice, called at the offices of some of these moving defendants and requested access to their records and papers. 749 Mr. Weaver was granted free access and he conducted an investigation for several days and selected from the files certain documents which were photostated by the particular companies concerned and copies thereof furnished to Mr. Weaver. • • •

“On February 6, 1945, a subpoena *duces tecum*, directed to Wallace & Tiernan Company, Inc., returnable on March 6, 1945, was issued out of the United States District Court for the District of New Jersey, Trenton Division. • • • Such subpoena was extremely

comprehensive in its terms and called, in effect, for the production of an immense number of papers and documents relating to the general conduct of the chlorinating equipment business, as well as relating to 116 specific jobs in which Wallace & Tiernan Company, Inc., was interested in all parts of the United States. Thereupon, by arrangement with the Department of Justice, Wallace & Tiernan Company, Inc., constructed and equipped offices in its plant for the investigators of the Department who conducted an investigation of the files during the period from March 1, 1945, to October 5, 1945. Usually three representatives of the Department were conducting such investigations."

Now bear in mind that he points out that the great bulk of the papers which were finally subpoenaed by your Honor's order—the bulk of those—had been previously examined by us, and it is Mr. Tuttle, I believe, who made these statements in open court as follows—based upon this inspection: "Now, consequently, whatever were our legal rights, we waived them, I am frank to say." That is Mr. Tuttle's concession, at the time he argued these motions to quash before your Honor, of the effect of that search. They waived any claim under the Fourth Amendment by reason of the inspection which they voluntarily accorded to the Government.

Now the inspection is very similar to that, I say, in the Zap case. In the Zap case they were compelled to do it under contract. Here they did it to avoid compliance with a subpoena. What has happened? Your Honor will recall in the Zap case the documents were misappropriated. In this case what has happened? The subpoena—If your Honor concurs with the defendants' views, the subpoena is bad by reason of the unlawfulness of the Grand Jury. The reason in the Zap case: misappropriation. The reason in this case: misappropriation because the Court, under the defendants' theory, had no power to issue the subpoena. But in the Zap case the court holds that the documents could have been introduced in evidence—the photostatic copy could have been introduced in evidence—that the Government could have photostated the documents, kept the photostats, introduced the photostats, and there would have been no violation of the Fourth Amendment.

The Court. This Zap case, is that the one in the Supreme Court?

Mr. KELLEHER. They are both in the Supreme Court.

The COURT. You are talking about the second one?

Mr. KELLEHER. Yes, sir, and it is cited in our brief.

Mr. EDWARDS. Could I say it is just the other way around? The decision on the Fourth Amendment came first and later on everything was thrown out as a result.

Mr. KELLEHER. Thank you. This is apparently the first case then, according to Mr. Edwards. Later on apparently it came up again on the issue of the lawfulness of the Grand Jury but it is a separate decision from that which your Honor considered, and we cited it in our brief.

I say, your Honor, the Zap case is on all fours with this case as far as waiver is concerned. In other words, your Honor, viewing this in the light of whether there has been any substantial injury to the defendants—a matter which certainly should be considered when a court is asked to pass upon whether the Fourth Amendment has been violated—viewing it in that light, I can't for a moment see how these defendants can contend that they have been prejudiced by any action taken by this Court. They voluntarily surrendered all of their documents to us. We viewed all of their documents, the bulk of them, as they say. We could have made photostats at that time. The Court could have never ordered those back. What is to be gained then, your Honor, by any holding that the entire proceeding is tainted by something that occurred several years later? Obviously, the defendants gave up what right they had to object.

The COURT. I can't follow you on that. What has this Court got to do with the New Jersey situation?

Mr. KELLEHER. Just this, your Honor,—

The COURT. That isn't part of the record here, is it?

Mr. KELLEHER. What I have read to you is part of the record. It is based upon affidavits submitted to your Honor in connection with other motions before you. The reason it is material is because we contend the waiver occurred in New Jersey. If there has been a waiver, regardless of where it occurred, it is binding, of course, only when it concerns the Fourth Amendment. Obviously, any waiver would have to occur in New Jersey where these companies' files are kept. There was a waiver because the defendant company permitted Government agents to come in and examine its documents. I say then that there can be no possible prejudice to the defendants when you find a situation

like this where the defendant has voluntarily permitted the Government to come in and examine all of its documents; when also you have a valid subpoena, a subpoena which has been attested by this Court, and a subpoena which this Court held was lawful under the Fourth Amendment.

I say to carry over the taint of this Grand Jury to the proceedings by which the documents themselves were obtained is to exalt that error far beyond what should be accorded to it.

I submit the defendants have been more than adequately protected here when this Court has quashed the
753 Grand Jury proceedings, dismissed the indictments, returned the original documents. I say that is as far as this Court should go in the exercise of its discretion.

Mr. TUTTLE. Your Honor please, I think I now stand justified in my statement that the Government's position was really a request for reconsideration of the order by which your Honor directed the return of the papers to us. I think I am also justified in my statement that it proceeds basically on the proposition that because your Honor's name was signed to the subpoena and because we had no capacity as witnesses—so the Government claims—to challenge that subpoena on constitutional grounds at the time, the consequent compulsory production of these papers and submitting them to an unauthorized body was something that we can't complain of and, by a curious extension of the logic, something which justifies the Department of Justice in retaining papers indefinitely.

Now let's put that to the test. Suppose—it is inconceivable but suppose—your Honor on this very subpoena directed the production of our books and records before twenty-three distinguished citizens in whom you have complete confidence for the purpose of conducting a sort of John Doe proceeding, they being a suitable Vigilante Committee, the argument of the prosecution is that because your Honor's signature was on that, that that at least constituted due process at the time the subpoenas were issued.

But I say—and I believe it is obvious—that
754 your Honor would have no power either under the common law or under the Constitution to direct the production of private papers of private citizens before unauthorized bodies, bodies that had no constitutional authority to make the examination, draw the conclusions, and to make decisions concerning them.

I go further. I say that your Honor would have no power to issue a subpoena to require us to produce these papers before the Department of Justice in order that the Department might make inquiry in its own right and for its own purposes. There was only one body in the world who had a right to instigate this process, these subpoenas, and to call for the papers, and that was the Grand Jury.

Under the circumstances it has to be looked upon this way in my judgment: That there were three participants in this matter. There was the Department of Justice which signed the subpoena. There was the Grand Jury that requested it, and there was the Court, that affixed its attesting signature. Two of those bodies had no right to see those papers at all by themselves. They could only get them on the assumption and on the foundation that the instigating body, the Grand Jury, was entitled to see the papers. The Court had no right to call for papers to satisfy its own desire to determine whether or not offenses had been committed. The Grand Inquest was the Grand Jury—and in my State they are called the Grand Inquest. They are

755 the one body in our entire administration of justice that has the right to pursue any information that it may have or may think it has and to call for witnesses and papers to compare them with the information it has and see where it leads. True, it asks the Court for implementation but the Court acts at the instigation of that body, and if that body has no legal existence, it is the same as a Vigilante Committee, the same as a group of distinguished citizens, however reputable, and certainly the Court would have no power and could add nothing by way of legality of due process to the situation by affixing its signature for production of papers to such a body as that.

Now my friend says nevertheless, because your Honor's signature is on that, there was a lawful search and seizure. I don't know why my friend feels himself justified in confining this thing solely to the Fourth Amendment. The decisions which have been cited on my brief, either as to the obligation to return the originals or to return the copies, do not confine the situation to the Fourth Amendment because the Fifth Amendment provides in so many words that no one shall be deprived of life, liberty, or property without due process of law, and the phrase, "due process of law," runs all through those decisions precisely as does the phrase, "unreasonable search and seizure."

There is no power in any department of the Government, including the Judicial Department, to deprive a citizen

of life, liberty, or property without due process of law and, consequently, that means the law of the land. There has to be a law which authorizes any department of the Government to go and take the property—and there is no more sacred property than one's private papers in this free land—and have them submitted to somebody else compulsorily for examination.

So it seems to me it is utterly inconceivable that there is any constitutional foundation for my friend's argument but I go further. The Constitution in these respects was but the declaration of common law till tyranny twisted the common law. Ever since the time of her Magna Carta, there has been no right on the part of the Crown to go and take the private property of citizens without due process of law; and my friend's citations from some ancient English Judge, who doubted whether contraband property could be seized, shows how far the English common law was supposed to go. So that we are dealing with things here where the Constitution is but really a full and explicit declaration, for purposes of having it settled, that the law of liberty, which is the common law, means that private property is not to be touched unless you can find a law in the land which justifies it. There is no law in the land which justifies a court, by affixing its signature to something that is called a subpoena, to reach in and take possession of private papers and turn them over to either the Department of Justice or a Vigilante Committee or private citizens, and say, 757 "Look these over". That is a denial of possession by law as well as reasonable search and seizure and it is a violation of the common law.

Our Supreme Court has said the only way to remedy that is to put the citizen back where he was when the Government was entirely ignorant and to prevent the Government and all participants from making any use of what comes from it. But here the Government is going farther. On this motion we are not discussing the use of the evidence. We are discussing the right of the Government to keep indefinitely and forever what is, in effect, all the contents of our private papers.

THE COURT. What do you say to that, Mr. Kelleher?

MR. KELLEHER. My answer to that, your Honor, is the only ground on which they can compel us to surrender our notes is that there has been a violation of the Fourth Amendment to the Constitution. That is the only thing that they can base their argument on, and Mr. Tuttle's own cases

show that. As he said, they all stem from the Silverthorne case. The Silverthorne case held that where there has been an unreasonable search and seizure, then the notes of the Government, which are the property of the Government, of the United States, must be surrendered in order to comply with the requirement of the Fourth Amendment; but your Honor, in order to cause surrender of our documents, our photostats and notes, must first find there is a violation of the Fourth Amendment.

Mr. TUTTLE. All I can say to that is if that is 758 so, then the expression in the Fifth Amendment

that the Government cannot take private property without due process of law is meaningless, and the consequence of the Government's position is this—and it is vital. It means this: That if the Government can by illegal proceedings get permission of the original papers of private citizens and, taking advantage of the opportunity, can photostat them and then be required to return the originals, the Government can turn around and say to the private citizen: "The photostats are our property and we will have the equivalent of what we would have had if we had kept your originals." That is a grand way, if the Department of Justice can ever establish it, to create methods of invading the privacy of private citizens which have not been recognized in this country at any time.

The COURT. Well, I will say frankly to the Government that that argument at this time doesn't sound reasonable to the Court and I shall have to be shown by very convincing authority that is so. The Court shall examine the authority with care.

Mr. KELLEHER. I would like your Honor to bear in mind this: Despite what Mr. Tuttle says about the superficial objective of these proceedings, that the net effect of what counsel is insisting upon is that the prosecution, insofar as it is based upon the documents in this case, must be dismissed. If they are entitled to the photostats, they are entitled to suppression. If they are entitled to suppression, all the evidence in those documents of a viola- 759 tion of law is excluded from consideration of this Court or any jury.

The COURT. What difference does that make, as far as this Court is concerned, if the rights of citizens have been violated?

Mr. KELLEHER. I think it is important for your Honor to appreciate the extent of the ruling which is requested.

The COURT. I shall decide it as I understand the law, regardless of what might happen to the Government. That is of no concern to the Court.

Mr. KELLEHER. I must emphasize when Mr. Tuttle says, "All we are asking for now is the photostats," that when he makes that demand, he invokes a principle which must inevitably then compel your Honor at a later stage to hold the proceedings in effect must be dismissed.

I would like to make one other point here. The Court held in *Wilson v. United States* that a witness could not attack a Grand Jury for irregularity in the Grand Jury provided it had what the Supreme Court has termed a *de facto* existence. Now, certainly, this Grand Jury before your Honor, which your Honor impaneled, was a *de facto* Grand Jury. Your Honor did not simply call in a group of citizens—to use the analogy of Mr. Tuttle—call in a group of citizens and submit the case to them. Your Honor impaneled a Grand Jury.

760 The witnesses at that time could not invoke the Fourth Amendment on the grounds that the Grand Jury was unlawful under the holding in the *Wilson* case. If your Honor is to rule, as counsel insist, then it means that the rule in the *Wilson* case has literally been dissolved because any witness can come in before a court and raise the issue of the legality of Grand Jury proceedings by claiming that a subpoena violates the Fourth Amendment to the Constitution.

The COURT. These are a little bit more than witnesses. These are actual defendants.

Mr. KELLEHER. My point is this: That when a man is compelled to produce documents in violation of the Fourth Amendment to the Constitution, he has a right at the very time he produces those documents to apply to your Honor and to say, "My constitutional rights are being infringed. I ask your Honor's protection of the rights accorded me by the Constitution."

Under the holding in the *Wilson* cases a witness, however, is not permitted to come in and attack the regularity of the Grand Jury, so I say it follows necessarily from the principle in the *Wilson* case and from the fact that where a man's constitutional rights are invalid, he may object at any time, I say it necessarily follows that the irregularity of a Grand Jury does not bear upon the issue of whether the Fourth Amendment has been complied with.

I can see no other way to reconcile that decision.

761 your Honor, and it makes no difference if these parties later become defendants or not. If their rights under the Fourth Amendment were invaded at the time they were compelled to produce documents, they had a right to make that claim then.

I would also like to have your Honor bear this in mind. Defendants certainly can't blow hot and cold at the same time. The fact is assuming they had the right to make that claim at the time they produced the documents—and they must have a right if there was a violation of the Fourth Amendment—they should have made it. They filed a motion to quash but they never raised this issue at any time. This issue is only a matter of afterthought. It is an attempt—

The COURT. What is the Government's right to refuse to return copies of those papers that go before the Grand Jury?

Mr. KELLEHER. I think, your Honor, the Government has a right. You mean what the source of it is?

The COURT. Yes, what right has the Government to take copies of papers that are subpoenaed before the Grand Jury, take them, and put them in their own personal file?

Mr. KELLEHER. I think it is the right of the Government, in prosecuting a case before the Grand Jury, to make its own notes.

762 The COURT. You are doing more than making notes. As an Assistant United States Attorney General you are presenting a matter before a Grand Jury and you have the papers of John Doe. What right have you to take pictures of them?

Mr. KELLEHER. I simply say we have a right to take what we consider necessary in order to run a prosecution.

The COURT. You mean whether it is a photostat or a note?

Mr. KELLEHER. Yes, sir. The thing is this: The ordinary practice would be to make notes or longhand copies. Supposing you have paragraphs that are in there—

The COURT. That is just an extension of the notes?

Mr. KELLEHER. Of the note-taking process. It is a modern up-to-date way of eliminating a great amount of work which would be required if we took notes on everything, and we would have to do about the net effect of what we do when we obtain photostats.

The COURT. Have you any authorities on that phase?

Mr. KELLEHER. No, sir, and I don't believe there are any.

The COURT. I would like to have some.

Mr. KELLEHER. We will certainly do what we can on the thing.

The COURT. In other words, Mr. Kelleher, what I am trying to drive at is what right have you to do this? It has been before a Grand Jury. As its attorney or the
763 State attorney, what right have you got to take pictures of these things?

Mr. KELLEHER. With your Honor's permission I will submit a memorandum of authority on this if we can find any. I think the answer is the one I made. It is a convenient way of making notes. Instead of making notes, you photostat the documents.

The COURT. That is quite an extensive—

Mr. KELLEHER. Is it, your Honor? Supposing we had just two or three documents which isn't true of a Sherman Act case, certainly any prosecutor—

The COURT. You can't make a photostatic copy of a record and submit it to a Grand Jury, can you?

Mr. KELLEHER. That law isn't definitely settled on it. I believe there is some law that indicates that the strict rules of secondary evidence do not apply in Grand Jury evidence. Our usual practice—

The COURT. I always understood the law to be the other way. You can't submit anything before the Grand Jury except legal evidence that should be given in a court of law.

Mr. KELLEHER. I simply point out I believe there is authority for the position you can. I will say our invariable practice—unless the defendants have conceded us the right to use photostat—is to use the original documents; and I
764 simply go further on photostats, to continue the analogy I raised before. Supposing there are critical documents in a case, certainly a prosecutor is perfectly justified during a Grand Jury investigation to copy off those documents if it is necessary in the preparation of his case—for the preparation of pleadings and the subsequent presentation of a case.

In a case like this you have literally thousands of documents which are or may be relevant in the course of a case so it becomes a physical impossibility for prosecutors to make the informal sort of analysis which would be made; consequently, photostatic study has been substituted. What is done is to substitute the photostats for the notes the prosecutor would make. I will submit a memorandum of authorities on that.

The Court. Is there anything else on this phase of the motion now?

Mr. Cross. Your Honor, I present Hellige, Inc., and we have a motion before the Court on this same matter and in view of the fact the matter has been completely covered by counsel, it will not be necessary for us to argue, but we wish to submit in behalf of the motion at this time.

Mr. Hogan. I might say, your Honor, the same position is taken by our firm in behalf of Novadel-Agene Corporation and Industrial Appliance Corporation.

Mr. Staples. I say, on behalf of Fairbanks, Morse and George C. Worthley, we also had a similar motion and I do not desire to argue it. I might say also I have received from Mr. Kelleher a set of photostats which I believe to be the photostats which were asked for in our motion.

Mr. Kelleher. The situation is this, your Honor, in that case of their company: The company itself submitted photostatic copies in lieu of original documents and pursuant to your Honor's order on the impounding order we returned their photostats. We do, however, have in our possession copies of those photostats which we made. In other words, they stand in the same position as every other defendant.

The Court. So as far as the other defendants are concerned, the arguments made by Mr. Tuttle stand on their behalf; and I understand the Government has photostatic copies of those documents that were subpoenaed.

Mr. Edwards. Perhaps one word ought to be added there just for the convenience of your Honor's note; that our motion and Mr. Hogan's motion for return of photostats is docketed in a separate proceeding, Miscellaneous No. 5647, whereas the motions to which I think Mr. Cross and Mr. Staples are proceeding are in the new criminal case.

The Court. Is there any special reason why that procedure was adopted? Why shouldn't these motions be returned and docketed the same as the original indictment?

Mr. Edwards. They have been taken from us under that proceeding which had terminated.

The Court. It is still on the record of the Court.

Mr. Edwards. Well, it could be treated either way. I think the docketing number is not important.

The Court. It seems strange to me it was docketed that way, not the same as the original.

Mr. Edwards. At the time we filed, the original criminal proceedings were at an end.

The Court. Still the record is in court here of the indictment. I haven't seen it done that way. That is why I wondered if there was any special reason for it. It seems to me the Court should consider these motions as part of the record of the original indictment.

Mr. EDWARDS. I think perhaps for purposes of the proceeding and appeal and the like it was considered cleaner to do it in that way.

Mr. TUTTLE. May I just add this, your Honor? I understand the Department of Justice is going to file an additional memorandum which, of course, we would like to see and perhaps have a couple of days to make a rejoinder, if necessary.

Just for the sake of the record, on this subject of waiver, I don't intend to argue it because I don't see there is any basis for waiver here or why the New Jersey procedure has any bearing, but the New Jersey subpoena, Grand Jury subpoena, was issued only to Wallace & Tiernan Company and to Wallace & Tiernan Products, not to
767 the other corporate defendants who were subsequently subpoenaed here and whose papers constitute a large part of the papers here.

There is no record made by the Department of Justice here in answer to our motion. They filed no affidavit. Consequently, I had assumed, until I read their brief, that they were proceeding on this alleged subject of waiver simply by making statements which were in the brief. I think if there is to be deemed to be any record other than our own motion papers on that subject, we should have an opportunity to have an affidavit from them to see what they claim as a matter of record and then to make our rejoinder. The rejoinder I have just indicated is of immense importance if their argument of waiver has any relevancy at all.

Then this general statement, they saw a lot of papers down there, doesn't mean a thing because that was a lawful Grand Jury, a lawful process, and they offered to assist us in getting papers together. That isn't a waiver of our being compelled to produce a lot of other papers, as well as those too, up here to go before an illegal demanding body. So I feel if this subject of waiver is to be in the case at all, I can't conceive of its relevancy under these circumstances. We have been held entitled to have the originals
768 back. What we want is the equivalent of the originals. Your Honor says it is quite an extension from the note taking process. It certainly is. If one's

private papers can be actually reproduced by the Department of Justice and then held, notwithstanding the illegal seizure, indefinitely and forever as the counterpart of one's private papers in their files, something new has been created in the law.

The COURT. In other words, as I understand it, Mr. Tuttle, the Government has not filed anything in denial of its motion to the return of impounded documents?

Mr. TUTTLE. Not a thing.

Mr. KELLEHER. And your Honor understands the facts we rely upon are the facts we recited in affidavits of the defendants before your Honor. Those are the only facts we relied upon here. We also cited Mr. Tuttle's concession—I believe it was—there had been a waiver of their rights.

Mr. TUTTLE. In regard to Mr. Tuttle's concession, if they had taken pains to look at what I said, what I was saying was that instead of insisting, on our part, of just sending up the papers to the New Jersey Grand Jury, we accepted the offer of the Department of Justice to help us identify papers which the Department regarded as called for by the general language of the subpoena. To that extent we waived our technical right of saying, "Well, now, here, we won't let you see them now but we know you will see them—"

The COURT. I still can't see what that has to do before this Court.

769. Mr. TUTTLE. I don't either.

The COURT. You are insisting on whatever legal rights you have here. That is the only problem, it would seem to me.

Mr. KELLEHER. Your Honor, where could there occur a waiver except in the home offices of the company where the files were kept?

The COURT. Apparently they are not waiving anything in this court.

Mr. KELLEHER. It is a waiver at that time, your Honor. It is that conduct in their home office.

The COURT. How is that helping this Court on going into a trial of what the facts were in that matter down there? Why should this Court do that?

Mr. KELLEHER. I suspect it is. If a waiver is material and if there has been a waiver, it is an inquiry for this Court.

The COURT. It is only statements. A waiver should be a question of law.

Mr. KELLEHER. It is a very substantial fact, your Honor. They permitted investigators in there. It is the very sort of consideration the Court considered in the Zap case. In the Zap case the defendant company admitted FBI agents in under the terms of the contract and it was the fact that those FBI agents were lawfully there inspecting the documents which led the Court to the conclusion that it did. We contend here we were lawfully in the files of this company down in New Jersey; that they waived the right to insist upon compliance to the subpoena. As Mr. Tuttle just said, they just let us in.

The COURT. I am only concerned, as far as these motions are concerned, with the photostats that you took of papers here. I don't care what you got in New Jersey. You may have more photostats of those. I don't care.

Mr. KELLEHER. My point is this: In order for your Honor to order the return of those photostats, you have got to find a violation of the Fourth Amendment. They have waived it.

The COURT. They haven't waived anything before this Court.

Mr. KELLEHER. By conduct. What difference does it make whether it is in Rhode Island or in New Jersey? My point is their conduct in New Jersey constitutes a waiver of their rights under the Fourth Amendment. They have let us in to inspect their documents. Therefore, there cannot be any unlawful search. Unlawful conduct doesn't retroactively taint the inspection made in New Jersey.

Mr. TUTTLE. We didn't give any general permission to look through papers in New Jersey at all. We had a lawful Grand Jury subpoena. We had to comply with it, but they said, "We will come in—" and I have it in writing here from the Department of Justice, offering to come in and tell us, so that we would be definite, what papers they intended to have. Of course, assisting us that way, they saw certain papers. To say we gave a general waiver on any kind of legal process is absurd.

The COURT. There are two companies in New Jersey, you said?

Mr. TUTTLE. Yes, sir; Wallace & Tiernan Company and Wallace & Tiernan Products, and I am saying, if this issue is to be considered here, there should be a record made by the United States Government of what they are relying on instead of saying, "Well, there are some old affidavits filed here a year and a half ago and we are talking about those."

That is a different proceeding. If they are trying to tell a story, they should have put in affidavits and we could have met them.

The COURT. Let me ask this gentleman: The subpoena in New Jersey applied to two corporations. It didn't apply to the other corporations and defendants before this Court. Does that argument apply to them?

Mr. KELLEHER. As far as their documents are concerned, it would not constitute a waiver.

The COURT. Would you concede they would have—

Mr. KELLEHER. I would concede, as far as those companies, as far as waiver of inspection by the Government in New Jersey, that would be confined to the companies that waived it, those two companies, but in their own affidavit they assert the bulk of the documents covered 772 by the photostats of the Government are such companies.

Mr. TUTTLE. Belonging to those two companies.

The COURT. It couldn't refer to anything else except the companies under subpoena.

Mr. KELLEHER. I don't so contend, your Honor; but I think the great bulk of those documents here are documents of those companies.

The COURT. I will tell you that is a matter this Court is not going into.

Mr. TUTTLE. Mr. Edwards tells me Mr. Karsted says there is only one company subpoenaed in New Jersey.

Mr. KELLEHER. May I now ask the Court whether we can submit affidavits supporting a precise showing as far as New Jersey is concerned?

The COURT. I will hold that in abeyance until we have lunch, gentlemen. You can make your motion and probably bring up some other procedure then.

Mr. TUTTLE. The other motion we are bringing up—that to preclude—is something else again.

The COURT. Recess, gentlemen, until two o'clock.

(Noon Recess.)

Afternoon Session—2:00 P. M.

Mr. KELLEHER. May it please the Court, this morning during argument—I have been reminded by Mr. Karsted that I mis-cited—misquoted a case. Instead of the Wilson 773 case to which I repeatedly referred, the case to which I had reference was *United States v. Blair*,

the case which is cited in our brief. I hope when your Honor sees my reference to the Wilson case, you will realize I meant Blair.

MR. TUTTLE: Will I proceed with the second motion, your Honor?

THE COURT: That is the motion to dismiss the information and to preclude?

MR. TUTTLE: Yes, sir.

THE COURT: Very well.

MR. TUTTLE: May I hand up the original copy of my brief in support of that motion? I have already given the other side a copy and all that we have received from the other side is no answering affidavit but a brief delivered to us this morning.

This motion involves various requests which, pursuant to the criminal rules, are united in this motion. First, a request that the information be dismissed as to the particular movant. These motions are by each of the defendants, corporate and individual, which we represent and they each move separately. The second request is in the alternative, expunging those portions of the information which reproduce or are based on information obtained from the illegally seized and impounded documents. The third request is the preclusion of the United States from using any information or evidence obtained from such papers. And, fourth, the general prayer for general relief.

774 Now I begin this argument with calling attention to a concession made in the Government's brief opposing the motion for delivery of photostatic copies of the originals. That concession is on Page 3 of that brief and it reads:

"If the movants' contention is correct, the results are far-reaching for not only would the movants be entitled to the Government's photostatic copies of these documents, but the Government would be precluded from using any knowledge gained from these documents to subpoena them again, and the evidence so obtained would be suppressed on the theory that the Government may not profit from its own wrongdoing."

Citing the *Silverthorne* case.

Now the opposing brief that is handed me today makes these points that I am about to enumerate and none other.

The first point is that only the corporations to whom the subpoenas were directed can make this motion and not the individuals who are officers thereof. They put it this way:

"No documents were obtained from the individual defendants, but only from the corporate movants, and it is well settled that when documents of a corporation

are taken by illegal search and seizure only the corporation has standing to move to suppress.

I don't think that the cases which they cite sustain such a broad proposition as that. The individuals are indicted for their conduct as officers of these corporations. They are all officers of the corporations and, hence, agents of the corporations; and I would maintain—I haven't had a chance to answer this brief, of course, or to research their authorities—but I would maintain the proposition that where officers were indicted for official conduct or as agents of a corporation and papers were illegally seized from the corporation, they would be entitled to take advantage of their principal's right to move for a suppression or preclusion, so far as the information was obtained from the illegally seized papers.

The next proposition that they make is that

"Where documents are obtained as the result of illegal search and seizure, the facts contained in the documents are not 'sacred and inaccessible.'"

That is one of those general propositions that is more literary than accurate. Objective facts, of course, carry no sacred character in themselves but if the Government's information concerning such facts, if the Government's knowledge of the facts, if the Government's ability to prove the facts has come about through illegal seizure, it is no answer to a motion to preclude that you can suppress the facts from the evidence and, therefore, you can go forward and prove the facts because you know the facts. If that line of argument could be pursued, of course, there would be nothing in the sanctity of the Fourth or Fifth Amendments at all in this connection. Consequently, to weigh that literary argument, you have to weigh it, in my judgment, against the background of the question: Can the Government get at those facts otherwise than through the illegally seized evidence? If the Government cannot do that, it cannot brush aside the matter of the evidence and say, "Well, that is merely of secondary consideration and the facts being not sacred, we can of course, establish them."

They carry that to this consequence in the conclusion of their brief:

"If, as the Court stressed in the *Silverthorne* case, the right to obtain suppression applies only to the illegally seized evidence and not to the facts reflected by such evidence, it is plain that the defendants are

not entitled to the suppression of a pleading which sets forth only such facts.

Now there is no such distinction at all in the Silverthorne case and if there were, the language wouldn't mean anything.

... the right to obtain suppression applies only to the illegally seized evidence and not to the facts reflected by such evidence.

Well, facts, of course, in a court of law can be obtained only as the reflection from evidence, either verbal or documentary. What the Silverthorne case purported to say was this: That the Government could obtain no advantage at all for any purpose from evidence illegally seized. There was the intimation, however, that if the Government had evidence, perhaps of the same facts from other sources and could disentangle them, why, then, they might use that other evidence. The Silverthorne case implied that the burden of carrying forward such disentanglement was on the Government necessarily, as such a burden
777 always rests on the wrongdoer. The wrongdoer cannot throw on the innocent party the burden of proving a negative.

So those are the only propositions in this entire brief, plus the concession that they make—it apparently is throwing sort of a Medusa head at the Court—that if the Court grants our motion on the return of the photostats, that the Government is out of court on the information.

I wanted to call your Honor's attention to the scanty argument that is being made on the other side here and the concession which they make. It shortens my own presentation very greatly if we were to—or if the Court were to accept that concession and adopt it. I think the concession has a great deal of force and is a legitimate interpretation of the Silverthorne case, an interpretation which they tried to get away with in the second proposition in their brief—get away from, rather.

Let me illustrate the extent to which these constitutional principles have been carried as the basis for an order of preclusion. I would like to take the case in our own Second Circuit of *Somer v. United States*. There, by some illegal means—it doesn't appear quite what—the Government's police officers, acting under the Alcohol Tax Unit, obtained information that led them to believe that there might be some contraband liquor in somebody's automobile. Inspired by that information and its possibilities, they

778 went and searched the automobile and found contraband liquor and seized it. The Government went so far as to contend that this was merely information that they got and it was something separate from the objective facts. The facts were the contraband liquor and the contraband liquor was not sacred and inaccessible. In the first place, it was contraband liquor and couldn't be sacred. In the second place, it was actually in the automobile and, therefore, accessible. Under those circumstances, using the argument which is used in my friend's brief, now they endeavor to twist the Silverthorne case in a way in which it is, in my judgment, twisted in the opposing brief.

But the Circuit Court of Appeals swept that all aside and said:

"As the record stands, it was the information unlawfully obtained which determined their course. Since therefore the seizure must be set down to information which the officers were forbidden to use, it was itself unlawful under well-settled law."

And then they cited the *Goldstein* case from which the following quotation in my brief was taken.

Let's apply all this law to this case. What is before your Honor on the record in connection with this motion? Simply a contention by the Government that for the two reasons stated in their brief this motion should not be granted. I don't think either of those reasons have the slightest relevancy whatever, either to the motion as a whole or to the motion so far as it is made separately by the various officers of the corporation on their own behalves.

779 Here were 202,000 pages of documents seized and brought here under circumstances I need not go into again for the purpose of being submitted to a body which had no consequential existence. The process, therefore, was illegal and unconstitutional, in my judgment, both under common law and under the Fourth and Fifth Amendments. I think the Government is right in assuming that by being obliged to return the originals—a decision which, as to them, they allowed for weal or woe, so far as their prosecution is concerned, to become *res adjudicata*—they cannot use that evidence.

They subpoenaed all the corporations and brought documents from all, I think, except one up here and, of course, months were spent in their examination by the Department of Justice which undertook to acquaint itself thoroughly

with that; and on the strength of that examination they must have advised the Grand Jury that in their opinion the evidence, which they submitted to the Grand Jury,—and I assume they only submitted evidence which they thought was competent—from these documents an indictment could properly be found for offenses in violation of the Sherman law.

It isn't for us certainly to undertake the task of trying to find out whether or not the Government knew any of these pieces of evidence or got any of this information from any other source. We are in this District and in this District alone. The only relevant consideration, in my judgment, is the record in this District; and I think they agree, so far as this motion is concerned, because they devote themselves merely to points of law here. But if they should undertake on this motion to endeavor to avoid the consequences by saying, "Well, some of this information,"—"some;" they couldn't possibly say "all"—"some of this information we may have gotten from another source;" they are confronted with this: The action of the Grand Jury was the Grand Jury's action. It was their determination as to what was reasonable cause to believe that a crime had been committed, and this information of theirs is merely an echo of what the Grand Jury found. Verbatim it is the same. The paragraphing is the same. The only difference is that they use the word "information" instead of the word "indictment." It was the Grand Jury's determination and they have simply echoed it.

Nobody, of course, can tell now what the Grand Jury—assuming it was a legal body—based its determinations on, its findings on, its judgment as to reasonable cause. It may well have been on the vast number of papers which were never known to the Government or on the vast amount of information which was never before the Government from any source whatever in this District, and I don't believe there is any other relevant consideration but that.

781 In consequence, we come to what I think is the correct rule of law stated by our own Second Circuit in *United States v. Goldstein*, 120 F. (2d) 485, affirmed in 316 U. S. 114. In that case there was a vast amount of information obtained by illegal means. The illegal means in that case were tapping telephone wires and intercepting conversation—violation of Section 605 of the Federal Com-

munications Act. And the question is what was the consequence of that?

In many ways that case is a weaker one for the suppression of the evidence because that evidence was obtained only in violation of the statute which didn't say that the evidence should be suppressed. There was not involved the constitutional issue or the basic common law issue of undue process.

Said the Circuit Court of Appeals in analyzing the Nardone case—which is in 308 U. S. 338—quoting now:

“That language cannot indeed serve as a ruling that the prosecution has the burden to show how far its proof has ‘an independent origin,’ but it is consonant with that position, and to some extent suggests it. In any event it appears to us”

This is our Circuit Court of Appeals.

“ . . . that this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled.”

782 Well, that is a basic principle of law which runs true in its application to many kinds of cases, both civil and criminal. Here, as I emphasize, we have 202,000 papers—a tremendous mass of documents—brought up solely for the purpose of influencing the Grand Jury to find an indictment. It must be assumed that the Department of Justice used those papers for that purpose. It is known, of course, and undisputed that they put vast numbers of them in evidence before the Grand Jury, to say nothing of their photostating an immense number. It was done for the purpose of influencing a decision by a Grand Jury whose mental processes now cannot be investigated and who, as a result of that pressure of evidence before them with the interpretations placed upon it by the representatives of the Attorney General for the Grand Jury, decided to find reasonable cause for a conspiracy charge.

That indictment, your Honor, has already been dismissed for other reasons but now we have the curious circumstance that they have repeated verbatim the findings of the Grand Jury, which findings, of course, they urged the Grand Jury to make. We have to be practical about that.

We all know what happens in the Grand Jury room. The Attorney General or the United States Attorney is the legal adviser. He marshals the case. He hopes for an indictment unless indeed he wishes to confess his case has come to nothing, which certainly didn't happen in this case.

Now he has taken the findings of the Grand Jury.
783. As to the mental processes, he cannot possibly analyze them because when the Grand Jury makes up its decision, he has to retire from the Grand Jury room. Nobody is in the Grand Jury room, not even the stenographer, when the Grand Jury discusses the case and votes on it. We will say, therefore, that this information cannot be sustained because even if it weren't all founded on information secured solely from these papers, disentanglement has ceased to be possible.

The Circuit Court of Appeals says that is not the misfortune of the defendants. It was not their responsibility. And in our case, your Honor, the Department of Justice was not taken by surprise when we moved in challenge of the Grand Jury because the Ballard case was in motion through the Federal courts at that time. It was the subject of great discussion—that issue—in the law journals; and, furthermore, the cases on which the Ballard case was founded by the Supreme Court had run back for a number of years, in which the Supreme Court had determined in repeated cases that a petit jury and a Grand Jury must be a reflection of the common run of people as set up for the State courts by the State statutes.

They elected to proceed so that the burden of the consequence can't be thrown upon us, and I don't see how they can, with good grace, shake any Medusa head before this Court in discussing their consequence. If they felt that that decision was not right and, therefore,
784. carried its consequences, they had an appeal direct to the Supreme Court of the United States from your Honor's decision. They could have short-circuited the Circuit Court of Appeals in this District under the special statute where indictments are dismissed on constitutional grounds so that both at the time when they were proceeding before this Special Grand Jury and after your Honor's decision, they elected their course and made their decision. And all we are saying is that if they, by that means or by those double means, tied themselves up in consequences which they now regret, the consequences cannot be thrown upon us and we can't be called upon to help them disentangle them.

But now let's assume that for some reason I am in error in stating that because this information is nothing but a repetition of the mental processes of the Grand Jury as to which nobody can now know anything about—assume I am in error in that for some reason or other, and we come down to the question whether disentanglement is possible.

If this was the action of the United States Attorney alone, if he had filed his information in the first place and it was his initial action, perhaps he could come in and say, "Well, I will do what no psychoanalyst in the world has ever been able to do. I will separate my mental processes into two parts in reaching the conclusion that there
785 was a conspiracy here. One part will be information that I secured from this, that, and the other quarters of the globe. The other part will be the information which I secured illegally from these seized documents; and now I will tell the Honorable Court that, excluding the latter, I would have still filed the information."

Well, certainly that isn't the disentanglement that is called for by the Circuit Court of Appeals decision here and we also know that simply can't be done by mental processes. No judge, who has heard *extra curia* important facts which are bound to stick in his mind and produce perhaps prejudicial conclusions, could sit in a case, and no juror would be allowed to sit in a case because it is known he can't separate the illegally secured evidence from the legal. It isn't justice—it isn't justice to the defendant that he should make that impossible effort. That is the important consideration. It isn't justice to the defendant. The defendant is entitled to procedure which brings to bear only an open mind and, in the event of an accusation, legally secured evidence only.

So that I say for both those considerations the only possible solution here is to wipe the slate clean, wipe it clean. Then if they feel that in this District or in any other District they can proceed upon the basis solely of demonstrably legally secured evidence, we will be prepared to discuss that question both from the legal standpoint and from the position of psychoanalysis.

786 Now I have an alternative here that there should, in any event, be expunged from this information a number of paragraphs which clearly, by their own language, are taken from certain documents which were, in part, these 202,000 papers. We have identified the paragraphs.

We have said what they are. They haven't denied it. In other words, we have on this record before your Honor the admission that certain paragraphs in this information—and they are the vital paragraphs—are lifted bodily from these illegally secured documents. We, at least, ask that even if the entire information isn't dismissed, these paragraphs be stricken out because they are the confessed product of illegally secured evidence.

Our third request in this case is for an order of preclusion. Of course, if the information is dismissed altogether, that is one thing; and, yet, that will not fully meet the situation because they might—I am not making any suggestions to them but they might cart this information around and try again elsewhere.

The only remedy for these defendants is to have an order of preclusion and that is the order that has been entered in all these cases that I have cited, both on my brief on the photostats and my brief here. It is an order of preclusion applicable anywhere in the United States at any time and for any purpose precluding the Government from using for its own gains—to use the language of the Silverthorne case—or for its own benefit—to use other language—in the administration of justice, from using
787 for any purpose anywhere this information. I think we are clearly entitled to that—certainly on this record. I am not prepared to concede that we would, under any circumstance, be bound to take the *ex parte* statement of the Government if it does attempt the process of disentanglement. I don't see how that process is possible here in view of the size, the number of documents that we have. But even if they should have undertaken an affidavit to make this disentanglement, I would say, first, their effort was irrelevant in view of the special circumstance in this case; in view of the fact that we are dealing with a District where they never had any valid source of information whatever. And I would say, secondly, that we are not bound by any such assertions because the mental processes are too difficult for even the most honorable man to assert when his own interest is involved. I think the cases which we have cited entitle us clearly, under this situation, to an order of preclusion.

I, therefore, ask that the motion be in all respects granted.

Mr. KELLEHER. May it please the Court—

The COURT. Mr. Kelleher?

Mr. KELLEHER. I do not intend to spend a great deal of time answering Mr. Tuttle's argument on this particular

motion. As we point out in our brief in opposition to the motion, the principal argument is set forth in our brief in opposition to the motion for the Government's photostats and our argument is the same; to wit, that there has been no unreasonable search and seizure here.

I would like to point out, your Honor, the point that I tried to make this morning, however, that this motion indicates that the defendants recognize the logical implications of their argument for the return of the photostats. That is, in effect, that they should gain immunity from the use by the Government of any of the documents obtained through the Grand Jury. Their contention is, in substance, that although the Fourth Amendment of the Constitution was adopted and has been interpreted to prevent police accesses, although the Government comes before your Honor with clean hands, although the Government was bound by your Honor's decision in the *Horowitz* case, although the Grand Jury was impaneled by your Honor, although the Government had no part in the decision of this Court to exclude women from the Grand Jury,—that despite all that, this entire case must be dismissed to the extent that it depends upon the documentary evidence.

Now I cannot and would not minimize the importance of the documents to the Government's case. Everyone familiar with these cases knows that an antitrust case depends upon the documentary evidence, and that is no less true in this case than in others which the Government has brought. So that we find that, although, as I say, there has been no wrongdoing by us, although our hands were tied by your Honor's decision in the *Horowitz* case, our lawsuits must be dropped because we are not permitted to use the documents which were subpoenaed to a Grand Jury impaneled by your Honor under a decision decided by your Honor in the case of *United States v. Horowitz*.

I say, your Honor, that certainly in justice and fairness to both sides no such interpretation of the Fourth Amendment is thus warranted. Your Honor is asked to put us in a position far more serious than the Government was placed as a result of a decision in the *Ballard* case. There, at least, after the Supreme Court had knocked out the Grand Jury which returned the indictment, the Government was at least in the position where it was at the commencement of the case. Here, however, the defendants would now

forever prejudice the Government's case for an error for which we are not responsible.

I submit, your Honor, that in fairness to the Government in this case, to the Government's side, there is no reason either in justice or law, no right of the defendants, which demands such an interpretation that they must forever go free from what presumably, for the sake of this argument, has been a violation of Sections 1 and 2 of the Sherman Act. I cannot believe that the Fourth Amendment has any such sweep.

So far as their motion directed to the information, it is completely novel. I do not quarrel with the principle established and asserted by Mr. Tuttle that if there has been an unreasonable search and seizure, the Government may not take advantage of its wrong. As we conceded in our brief and as I have emphasized, the issue is far broader than whether we must return certain photographs. We cannot use the results and product of an unreasonable search so that if there has been one, your Honor should not only suppress the evidence; your Honor is required under the decisions of the court to prevent the Government from making any use of knowledge gained as a result of that unreasonable search.

Now it would be less than fair for me, your Honor, to try to imply that the indictment returned by the Grand Jury or the information filed by us is not based upon the documents in the case. Obviously, thousands of those documents were produced; many of them were submitted. I would not assert for a minute that I could point out to your Honor what part of the information is based upon documentary evidence nor what part is based upon testimony or upon evidence obtained by the Government independent of the subpoenas. That is a matter, I submit, which we are not in a position to do.

I might observe, however, at this stage that the information itself is nothing more than a charge. It is certainly no evidence against the defendants, as they would be the first to insist if we made such a claim. It is simply an outline of the ultimate facts in the case and I say that, therefore, even giving full weight to the implications of the doctrine in the Silverthorne case, there is no real practical reason why the defendants' motion to dismiss the information or to expunge the portions thereof that they mention should be granted.

I would like to mention that the portions of the information to which the defendants refer are, as Mr. Tuttle has said, critical portions of the information. They embrace the greater part of the charge. If defendants are right and if your Honor agrees with them, an order to expunge those portions of the information is certainly the equivalent of an order dismissing the information.

Furthermore, I might mention in closing that if your Honor grants their motion suppressing this documentary evidence, the net result is, in substance, that the Government's case is largely emasculated.

The COURT. What?

Mr. KELLEHER. Emasculated.

The COURT. That isn't the Court's concern, is it?

Mr. KELLEHER. I submit, your Honor, it may be your Honor's concern. I think it is rather important. After all, we have—

The COURT. I can't follow you on that, that the Government's case may be emasculated. That isn't the doings of the Court.

Mr. KELLEHER. It is the doings of the Court.

The COURT. The Court isn't here sitting to help the Government.

792 Mr. KELLEHER. I don't intend to suggest that at all. I have no such impression, your Honor. My point is, though, that it is important for your Honor to consider who is at fault here, if anybody has been at fault. Is the Government at fault? What wrongdoing are we guilty of?

The COURT. That is the contention of the defendants; of course, not the "fault" in the sense that you didn't think you were proceeding properly at the time or that the Court wasn't proceeding properly at the time. That is another matter.

Mr. KELLEHER. I say, your Honor, where you have a situation like that, that doesn't call for an invocation of the Fourth Amendment to the Constitution. The Fourth Amendment to the Constitution is directed to arbitrary oppressive action by the Government, not to an erroneous decision by your Honor concerning the legality of a Grand Jury.

The COURT. I understand that.

Mr. KELLEHER. The point that I make concerning the information is simply this: To a large extent the question of whether the information should be stricken is an academic one if your Honor grants the motion to suppress.

the evidence because a motion to suppress the evidence, in effect, takes the case away from the Government.

793 Mr. TUTTLE. I don't believe, your Honor, I wish to add very much in view of the sweeping concessions which Mr. Kelleher has made but I do deprecate the suggestion that in some way the situation which he deplôres is somebody's fault other than the Department of Justice. I don't think this language about the "fault" has any place in the case. The question is one of constitutional rights.

The COURT. That is what I tried to convey to the Government's attorney on that in the statement I made. There is no charge here that anybody intended to do anything wrong in that sense.

Mr. TUTTLE. Because your Honor decided the Horovitz case before you had the benefit of certain decisions by the Supreme Court of the United States is no reason for implication that all this is the fault of the Court, and that is the implication in my friend's argument and that is the reason why I deprecate the use of the term, "fault," at all.

Long before this Grand Jury handed down its indictment and certainly long before this information was filed, the Department of Justice was fully enlightened about the trend of the decisions by the Supreme Court as to the constitution lawfully of a Federal Grand Jury and petit jury and they could read the law as well as we could. So that to go back to an old decision by your Honor in the Horovitz case and say, "There is where they stubbed their toe," is scarcely fair nor is it accurate.

794 The COURT. I might add further than that too, the Government knew the situation as far as the Horovitz case was concerned in the previous decision made by Judge Mahoney in this District under those circumstances, so everybody, I think, knew or should have known—at least the United States Attorney knew that situation here.

Mr. TUTTLE. I would add only this, your Honor: My friend clings to the exclusiveness of the Fourth Amendment. I tried to point out that we are dealing here with the Fourth Amendment, the Fifth Amendment, and some elementary principles of the common law. But when he says that the Fourth Amendment was designed only to prevent oppressive conduct by the Government, I don't know what he means by "oppressive." These Amendments—Fourth and Fifth—were designed to prevent the Government from

taking private property otherwise than under the law of the land. That was the language of the Magna Carta. It has been the law ever since and to inject this element of oppressiveness in it is, of course, to open a little rift and then ask us to go down the avenue to which that rift leads.

It isn't the question of oppressiveness. It is the question of the law of the land and our founding fathers based themselves upon the Anglo-Saxon experience that when there was a departure from the law of the land, it opened a door towards oppressiveness even if the departure itself in the particular instance was not serious.

795 The old maxim is that the price of liberty is eternal vigilance and you must begin by the small things to draw the line. There is no higher duty, no more sacred prerogative that can come to any Court than to uphold the Constitution of the United States between the Government and the citizen; and what is happening so lamentably abroad in so many countries and what has happened there tragically in the last few years is this very argument: That in fairness to the Government, the door must be opened to constitutional violation and to the invasion of the citizen's liberty. "In fairness to the Government"—it is merely another way of stating what came to be very unpopular when it was called the Divine Right of Kings.

The COURT. I understand, gentlemen, that there are similar motions on behalf of the other defendants to that which we have been discussing. Am I correct on that?

Mr. HOGAN. That is correct, your Honor.

The COURT. All defendants?

Mr. STAPLES. There is no such motion in behalf of Fairbanks, Morse to suppress and this second motion.

Mr. WILKINS. And there is none on behalf of Builders Iron Foundry.

Mr. HOGAN. So that the record may be straight, your Honor, I would like to have it appear, as a matter of record, that there is such a motion so far as the defendant, 796 Novadel-Agene Corporation, is concerned and Industrial Appliance Corporation, and that we share in the views expressed by Mr. Tuttle and join in his motion.

Mr. JOSLIN. I don't believe the basis of the motion filed on behalf of Schutte & Koerting is that urged by Mr. Tuttle. I believe it is another basis.

797 District Court of the United States for the
District of Rhode Island

" Ind. No. 6055

UNITED STATES OF AMERICA

v.

WALLACE & TIERNAN CO., INC., *et al.*

Before His Honor Judge Hartigan

Tuesday, April 20, 1948

Hearing on Motion to Stay Orders

ARGUMENT BY MR. TUTTLE

STATEMENTS BY MESSRS. HOGAN, CHESEBROUGH AND WILKINS

798 Tuesday, April 20, 1948

Mr. TUTTLE. May it please the Court—

The COURT. Mr. Tuttle?

Mr. TUTTLE. I think it important at the outset to observe clearly what is actually before the Court at this time and all that is before the Court at this time because only by so doing is it possible to know what legal issue, if any, is presented. What is before the Court is only one motion. It is a motion for a stay. It is in four lines and it is unaccompanied by any affidavit. It states no purpose. It gives no reason and it merely asks that the Court stay the order that was entered on February 18, 1948, which order directed the delivery of the photostat copies taken by the Government as the result of an illegal search and seizure to the defendants. Orders on behalf of other defendants were issued on March 4 and April 5.

At the time when we were before your Honor on the question of the terms of the order of February 18 and the request by the Government for a stay, I recall there was some intimation by the Government that they might attempt an appeal from that order, and they invoked the discretion of the Court, as they claimed such discretion to exist, to preserve the status pending an appeal. They have taken no appeal. The time within which to appeal, if appeal were allowable at all, has expired. That order was entered also solely in a criminal proceeding. By its terms it was dedicated as part of the original criminal proceeding instituted by the indictment which your Honor set

799 aside under circumstances familiar to us all. It was not entered as an order granting a motion in a special proceeding but it was associated with and made part of that original criminal proceeding as ancillary and incidental thereto precisely as was the order granting the return of the original documents because your Honor—to use a colloquialism—clearly felt the tail should go with the hide.

The Government has pursued—and I say this with all respect for the Department of Justice—a most curious course as it seems to us. It had a right to appeal from the basic decision establishing the basic and controlling principle here when your Honor dismissed the indictment. It being a dismissal of the indictment, the Government had, under the special statute, a right of appeal, not merely a right of appeal but one directly to the Supreme Court of the United States and we know from confession made by representatives of the Government here that the question of an appeal was much considered in the Department of Justice and finally they elected against it.

At the same time that your Honor entered an order dismissing the indictment, you also entered an order the same day directing the return of the vast mass of original documents. The Government was then put upon notice that a principle of far-reaching consequence in this whole body of litigation was being started and I think it altogether

800 possible that the Government could have appealed from that order then simultaneously made. I haven't studied this question but I think it altogether possible the Government could also have appealed from that order as one that was part of the fundamental decision dismissing the indictment, which fundamental decision was certainly appealable. It was like a postscript to the order dismissing the indictment, which order was a final decree, and it was simply recognized as ancillary thereto and really is a term thereof, that the original papers should be returned.

So I am saying the Government had in reality two bites at the cherry of appeal which it could have taken at that time. Instead for reasons best known to itself, it elected to appeal from neither order nor from the two orders treated collectively. It let them stand and, in consequence, between us and the Antitrust Division there comes into play certain principles of *res judicata* and estopped by final decision that you well know and which are now determined for all time as between them and us as controlling principles

of law in this case; and that basic controlling principle of law was that the seizure of our property was an unconstitutional seizure of papers and records within the meaning of the Fourth Amendment in the Constitution of the United States and, in consequence, brought into play the interpretation of that Amendment in the classic Silverthorne case.

I am emphasizing this because it has a great bearing
801 here and because the intimations made in the past

that somehow or other the Department of Justice was not responsible for the difficulties in which they found themselves have always seemed to me a little unfair both to us and to the Court.

Now, when we presented the motion for the return of the photostats, that too was ancillary. We submitted to your Honor's decisions which held, as did the Rogers case decided by the Circuit Court of Appeals in this very Circuit, that what was done incidentally by the Government in connection with papers illegally in its possession must be completely annulled and certainly they could not for their private use recreate the equivalent of our property by making photostatic copies of it. And your Honor so held and that was the order of February 18 and again there was no appeal therefrom even though that was in the criminal proceeding; and by the same analogy I have mentioned they might—I don't concede it but they might have attempted to treat it as merely part of the original basic decision.

Now what do we have here? The time to appeal has expired from all these three determinations and we are suddenly confronted now with a motion to stay; a stay pending what? It isn't stated. This isn't a stay pending an appeal which they have taken or are about to take from any one of these decisions. They are not proposing to

appeal from any one of these decisions as far as I
802 can see from this motion paper. What they are saying

in effect is that in some other litigation, not in the criminal proceeding, not in the litigation or suit in which your Honor made these decisions, but in an entirely different suit, a civil suit, they intend to move to ask your Honor to vacate orders (2) and (3) and thus in effect vacate order (1); because you would be nullifying and repudiating the principle which you decided when you entered order (1) dismissing the indictment and the ancillary and necessary application thereof which you gave when you made orders (2) and (3).

So we start off, if I can associate it, in view of my friend's argument, they are perfectly blind and loud in a motion for

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a stay here with some motions they propose to bring before your Honor on May 30. I say if I can associate it with it, we start off with the astounding proposition that they are going to appeal in a civil case from these orders which you made in a criminal case. In my brief experience with the law I have never heard of that. The Government's right of appeal is statutory, pure and simple, and there isn't a statute on the books which gives the Government a right to appeal in a civil case from an order made against it in a criminal case. There is no such process known to the law, if they attempt, as apparently they do in this brief which they have just given me a copy of and which, I understand, they have just handed to your Honor, to say that
803 they are going to appeal. I think they should be more frank.

Let me read the conclusion of their brief. It is very blindly worded. It says:

In the instant case the orders in regard to which the Government's motion is directed
You see it is in the plural; "the orders." They don't state what orders they have in mind.

In the instant case the orders in regard to which the Government's motion is directed rest upon the decision of the Court that the illegality of the grand jury rendered the grand jury subpoenas *duces tecum* illegal and equivalent to an illegal search and seizure in violation of the Fourth Amendment. The question is a novel one and is, it is submitted, not free from doubt.

Let me pause there before I read the next and highly significant sentence. Whether or not it originally was free from doubt—those orders—and the principle which your Honor upheld in making them; whether or not all that was free from doubt—and I don't think it was—how come that they are now proceeding to talk as if they were seeking to argue those matters? There is no motion here to re-argue those matters. There is no motion here to rescind any of those orders. There is no appeal from any of them. They have allowed themselves to get into the position where they are no longer able to say that your Honor's decision was free from doubt or was affected with doubt. They have allowed themselves to be concluded by those decisions and

804 so far as these litigants are concerned, between us and them there is no longer any doubt. That is final. Otherwise, there is no end of litigation whether it is criminal or civil.

Now I say, what is their next sentence?

"The orders will deprive the Government of photostatic copies made by the Government and there is no assurance that, if the appellate court should reverse the decision of the district court, the Government will be able to regain its documents."

What does that blind statement mean: "if the appellate court should reverse the decision of the district court?" How can the appellate court reverse the decision of the district court? There will be no jurisdiction in the Circuit Court of Appeals because there will be no appeal. Those orders stand. By the statute limiting the right to appeal to thirty days, they have become final and there is no court which can reverse the district court in connection with those orders now.

So we have the extraordinary anomaly which they don't expressly confess in this brief and in this motion which they are submitting to your Honor but which, it is perfectly plain, they are conscious of: that they are trying to appeal in a civil case from orders which have become final in a criminal case; and then induce the Circuit Court of Appeals hearing the alleged appeal in the civil case to reverse the orders in the criminal case; and for that purpose apparently they are asking a stay.

Now your Honor has decided two things in addition here which have a bearing on what Mr. Karsted—

805 Mr. EDWARDS, Mr. Kelleher.

Mr. TUTTLE.—Mr. Kelleher has just said: Your Honor did not deny our motion to preclude the use of the information gained from the illegally seized documents. Your Honor in that decision of the other day drew a distinction between our right to recover our property and to suppress any information obtained from that illegally seized property on the one side; and on the other side, the possibility that the Government might have other information not from and through the documents illegally seized but other information obtained from other quarters which could be introduced in support of their information on the trial thereof—their criminal information on the trial thereof; and, in consequence, all you denied was our motion to dismiss the information on the ground they could have no evidence to sustain it.

That is made entirely plain by your Honor's statement at the conclusion of your opinion of the other day, April 14, in which you said:

The Court's opinion of February 6, 1978, is controlling as to paragraph 3 of the motion.

Now, paragraph 3 of the motion is

"An order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents."

That was your decision on April 14 and when an 805-A order is entered on it, no doubt the order will be in conformity therein.

Now what we obtained on February 18 was solely complete effectuation of your Honor's two prior decisions; that we got our property back and the equivalent of that property which the Government had illegally created for its own use. We got that back plus a decision in conformity with the Silverthorne case; that they could not use any information obtained in or through that illegally seized property.

Now notwithstanding that decision was rendered over two months ago now, we still haven't got the photostats and we have no reason here assigned in this motion today why we shouldn't have those papers back. When we were before your Honor before, you asked the question how would we be prejudiced if the other side wanted to preserve the status pending an appeal. The Government did not say; in fact, they declined to say whether they would actually appeal. They had that under consideration and, therefore, your Honor had a situation before you which you don't have today. You had before you the possibility of an appeal and a request by the would-be appellant to preserve the status pending an appeal. That is a familiar situation and involves certain discretionary powers on the part of the Federal Court. Now you don't have that situation and we respectfully ask that we should have our property back.

806 We don't have to say under the circumstances how we are prejudiced or how we are hurt. We are hurt because they have our property without color of law and contrary to the provision of the Constitution. The same principle applies as governed your Honor in giving us back the original documents. We want the copies. They are ours because they recreate our property. But even if that isn't a sufficient answer, now that we know the Government is not appealing and the question of a discretionary power in the lower court to preserve status pending an

appeal is not involved—we know that—I say we have considerations in addition to our constitutional right to have our property back forthwith. It is the only way that our Constitution can be preserved from gnawing erosions and corrosions which would render its guarantees and its protections meaningless.

We have, however, these additional considerations. If we turn not at all to this motion paper but to some motions which they propose to bring before the Court on May 3, we find that they are using these documents and propose to use them, for all purposes, in complete repudiation of decisions which they allowed to become conclusive. I haven't ever had before me a precedent for this method of stultification and this defiance not only of orders but of the Constitution itself in an adjudication which they have allowed to become final. What they are saying is not what 807 they say in their brief here because in their brief they haven't made plain the anomaly of attempted appeal in the civil case from the criminal order. What they are saying in their order is this—motion, rather, which they propose to bring on on the civil side on May 3:

"The plaintiff moves the Court to vacate the order on motion for return of photostatic copies of documents entered February 18, 1948, in United States v. Wallace & Tiernan Company, Inc., Indictment No. 6055."

That motion is entitled in the civil action No. 705 and in that civil action they are going to ask your Honor to vacate an order which you made in a criminal action which has become final and which in the criminal action they have not moved to vacate.

In addition they say there the reason for that prospective motion in the civil case is that they need the photostatic copies "for the trial of this cause." They need it "for the trial of this cause;" namely, the civil cause; completely contradictory of the decision which you made just the other day in the criminal case that they could not even use the information,—much less the documents—the information obtained from these documents in any cause for any purpose in conformity with the Silverthorne case.

Now have they the impression I don't see it presented in their brief that the Fourth Amendment doesn't apply to a civil case and that your Honor, therefore, in consequence, should confine your decision by some interpretation to the criminal case which is now out the window? The answer to that is that there is no such

distinction. The Circuit Court of Appeals in this very circuit has dealt with that question in *Rogers v. United States*, 97 Fed. 2d 691. That was a civil case. It was an action of assumpsit by the United States to recover customs duties—a pure civil case—and papers had been illegally seized in violation of the Fourth Amendment. The court discusses the *Silverthorne* case, cites its language, and then says:

"If a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the Government in violation of the Fourth Amendment, we think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid."

Well, the same thing in another circuit appears in the case of *Schenck v. Ward*. I didn't mean another circuit; I meant another district. It is in the same circuit; a decision in the District of Massachusetts by Judge Ford, 24 Fed. Supp. 776, in which, after referring to the Fourth Amendment, the court said:

"... evidence obtained by the Government in violation of a person's rights secured by the Fourth Amendment is not admissible against him in criminal proceedings. This principle of law has been extended to civil cases as well."

Citing the *Rogers* case and two other decisions.

809 I am not attempting to argue motions which are not before your Honor. Mr. Kelleher has referred to them somewhat prophetically and it has been necessary for me to point out that the motions to come are in the civil cause and for the complete subversion of any decision that has been heretofore rendered in the criminal case.

I submit, therefore, in conclusion that there is nothing before your Honor as a basis for this stay. At the time when we were before your Honor last, there was a suggestion by Mr. Kelleher that in addition to retaining these photostats pending the possibility of a decision to appeal, they wanted to list them. They thought they had the right at least to list them before they returned them and that they were very voluminous. Well, they have had a lot of time to do their listing and there isn't a word said in any of the papers which are before you now or which are to be before you on May 3 that they need more time to list papers before they return them to get up a receipt. You remember the discussion that they were entitled to a receipt. They

have had ample time to get a receipt and to do their listing if they were to list. But it is interesting to observe that in this Rogers case, the Circuit Court of Appeals in a civil case, said that they couldn't use the illegally seized documents—and I quote: “* * * even as a means for drafting subpoenas describing the papers sought to be produced.” Your Honor will recall that we protested at the time before against giving them time even to list the papers. There is a decision saying they have no right to even list the papers for the purpose of getting out a subpoena.

Their second motion, which they will bring before you on May 3, is to require us to produce before your Honor and for their inspection the originals themselves; not photostats, but the originals. In other words, in violation of this Rogers decision they have undertaken in their moving affidavits to set forth what these papers are, what the originals are, as they have gathered them—the contents thereof from our photostats. In other words, they are deliberately saying here: “We are taking advantage of this stay for the purpose of familiarizing ourselves with the contents;” whereas I understood, if my ears conveyed the message to me rightly, that nothing was to be done by the Government as to these photostats, if your Honor was gracious enough to grant them a stay, except to possibly give a receipt and list them accordingly.

It will now appear before your Honor, as these papers come on on May 3, instead of that they are not interested in receipting or listing, they are interested in having these papers and having the originals for use at the trial; and in order to get up their motion papers, they have familiarized themselves with the contents thereof and set that subject forth in the very motion papers, spreading them on the record of this court which is a public record.

I think, therefore, that if it becomes material, although I would deny it—to inquire how we are hurt by more stay for an indefinite time, now they are asking for a stay *ad infinitum*—how would we be hurt? The answer is we are already hurt by the refusal to return our documents to us in accordance with your Honor's decision—our property—and, in the second place, the unconstitutional use which they are now making of them to our prejudice and for the very purpose which the constitutional provision condemns.

Let them return to us the photostats. We are not going to burn them up. We are not going to destroy them. We

will keep them and if they can find some process by any ingenuity conceivable some day or other in the future by which some court, no matter what, will say: "Let them have the photostats again," they will be there. They don't have to be warehoused here where the Government can make its preparation for trial out of them as they are now doing.

I ask, therefore, that this stay be denied.

Mr. LACRENCE J. HOGAN. Your Honor please, in behalf of the two defendants, Novadel-Agene and Industrial Appliance Corporation, I propose merely to take sufficient time to have this record disclose that in behalf of both of these defendants we oppose the motion of the 812 Government. In the interest of expedition I will

state that the grounds we urge in support of our position are those so capably and completely set forth by Mr. Tuttle in his detailed argument, and those arguments, with your permission, we respectfully—in the interest of expedition of time we respectfully ask permission to adopt and urge them in support of the opposition to the motion.

Mr. CHESEBROUGH. Your Honor please, in the absence of Mr. Staples, I am speaking for the Fairbanks-Morse defendants. I cannot add anything to what Mr. Tuttle has said except that I would like to point out the position of Fairbanks-Morse is slightly different from the Wallace & Tiernan group. The first difference to which I want to invite your Honor's attention is that the Fairbanks-Morse respondents are not parties. I understand, to the civil proceeding so that the stay which the Government asks in respect to the Fairbanks-Morse order which, I understand, was the order of March 4, is asked for by the Government on the basis that they are going to take some appeal proceedings in a cause to which Fairbanks-Morse is not even a party.

The second distinction to which I would like to invite your Honor's attention in regard to Fairbanks-Morse is that the order concerning their papers was entered without objection by the Government, and I urge that they should, therefore, not now be heard to say that the execution of that order should be delayed.

813 Mr. WILKINS. If your Honor please, these two motions are, of course, directed to the orders of April 5 which directed the return of documents to Builders Iron Foundry and to Proportioners, Inc. So far as Builders Iron Foundry is concerned, it objects and the grounds of

its objection have been very ably and fully stated by Mr. Tuttle. I would note the additional one, that that order, as was the order in the Fairbanks-Morse case, was entered without objection by the Government.

So far as Proportioneers are concerned, in addition to the arguments advanced for the defendants here, Proportioneers is in an entirely different situation. Proportioneers was not even a defendant in the original indictment. It is not now a defendant in the criminal information and it is not a party defendant in the civil action. The Government advances as a reason for a stay against that order its intention to appeal from that order in the civil cause to which Proportioneers is not a party. I would like that noted.

The Court. Any other defendants?

(Reply by Mr. KELLEHER.)

814 I hereby certify that the foregoing, Pages 1 to 18 inclusive, is a true and accurate transcript according to my stenographic notes.

EUNICE J. ARCHAMBAULT, S
Official Reporter.

815 In United States District Court

*Notice of application for entry of judgment
together with attached form of judgment.*

Filed August 27, 1948

PLEASE TAKE NOTICE that the attached Judgment will be submitted to the Court at 14:30 o'clock on Sept. 3, 1948.

ALFRED KARSTED, S

Alfred Karsted.

Acknowledgement of service is hereby made August 27, 1948 at 12:03 P. M. Eastern Daylight Time.

GERALD W. HARRINGTON, S

*Attorney for Wallace & Tiernan Company,
Inc., Wallace & Tiernan Products, Inc.,
Wallace & Tiernan Sales Corporation,
Martin F. Tiernan, William J. Richard,
Gerald D. Peet, Harold S. Hutton, Vincent
Pisani and Cornelius F. Schenck.*

HOGAN & HOGAN, S

CHAUNCEY E. WHEELER, S

*Attorneys for Builders Iron Foundry and
Henry S. Chafee.*

(attached Judgment)

The above entitled case came on for trial on June 2, 1948 and, pursuant to the Court's opinion dated August 6, 1948, it is ORDERED, ADJUDGED, AND DECREED:

That the Government's request for judgment and relief prayed for in the complaint is denied and the action is dismissed without prejudice.

Dated: August 1948.

District Judge

816

In United States District Court

Judgment—Entered and Filed Sept. 3, 1948

The above entitled case came on for trial on June 2, 1948 and, pursuant to the Court's opinion dated August 6, 1948, it is ORDERED, ADJUDGED, AND DECREED:

That the Government's request for judgment and relief prayed for in the complaint is denied and the action is dismissed without prejudice.

Dated: September 3, 1948.

JOHN P. HARTIGAN,

District Judge

817

In United States District Court

Praecipe by Undersigned Defendants

To: The Clerk, United States District Court, District of Rhode Island.

Pursuant to paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, the undersigned defendants designate the following additional portions of the record desired to be included, in the preparation by the Clerk of the transcript of the record in the above entitled case for the purported appeal attempted to be taken by the plaintiff to the Supreme Court of the United States:

A. The purported Indictment in United States of America v. Wallace & Tiernan Company, Inc., et al., Indictment No. 6055.

B. The purported Criminal Information in United States of America v. Wallace & Tiernan Company, Inc., *et al.* Criminal Information No. 6070.

C. Opinion of District Judge Hartigan, filed May 26, 1948, in this action (Civil Action No. 705), on plaintiff's (1) Motion to Vacate Order on Motion for Return of Photostat Copies of Documents, (2) Motion for Production of Documents under Rule 34, which said motions were filed April 14, 1948, and (3) Motion for Production of Photostatic Copies of Documents Surrendered by Plaintiff, filed April 22, 1948.

D. That portion of the transcript of the hearing of March 19, 1947, in Indictment No. 6055, before the Court, beginning with page 93 and continuing to the end of said transcript and covering the argument and colloquy on the motions for the return of impounded documents.

818 E. That portion of the transcript of the hearing of September 8, 1947, in Indictment No. 6055 and Criminal Information No. 6070, before the Court, beginning at page 1 and continuing through the sixth line of page 96 thereof, covering the arguments and colloquy on the motion for return of photostat copies of documents and motion to dismiss the Information and preclude.

F. That portion of the transcript of the hearing of April 20, 1948, in Indictment No. 6005, before the Court, covering the arguments and statements of Messrs. Tuttle, Hogan, Chesebrough and Wilkins on the plaintiff's motion to stay entry of orders, being numbered as pages 1 to 19 (which constitute a supplement to page 5 of the transcript of said hearing), said other portions of the transcript being Exhibit N, attached to the affidavit of William H. Edwards, filed herein, in Civil Action No. 705, on April 30, 1948, and designated in the plaintiff's praecipe as part of Item No. 10.

G. The Clerk's attention is invited to the fact that, in the plaintiff's Praecipe, Items 15 to 23, inclusive, refer to the subpoenas therein listed as dated May 12, 1948. The correct date for such subpoenas, according to the records of the undersigned defendants, is May 11, 1948.

The undersigned defendants, in serving and filing this praecipe, reserve their rights to challenge the right of the plaintiff to appeal, the purported appeal which has

819 been instituted by the plaintiff, and the jurisdiction of the Supreme Court of the United States to entertain the same.

October 13, 1948.

WILLIAM H. EDWARDS
EDWARDS & ANGELL,
Attorneys for Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck.

EDWARD T. HOGAN,
LAURENCE J. HOGAN,
HOGAN AND HOGAN,
Attorneys for Noradel-Agenc Corporation and Industrial Appliance Corporation.

S. EVERETT WILKINS, JR.,
HINCKLEY, ALLEN, TILLINGHAUST & WHEELER,
Attorneys for Builders Iron Foundry and Henry S. Chace.

Oct. 13, 48.

Service acknowledged.
GEORGE F. TROY,
United States Attorney.

820 In United States District Court

Second and Additional Praecipe of the Defendants

To: *The Clerk, United States District Court, District of Rhode Island.*

Pursuant to paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, and by way of addition to the praecipe filed and served herein by the undersigned defendants on the 13th day of October, 1948, and within the time specified by the aforesaid rule, the undersigned defendants designate, by this second and additional praecipe, the following additional portions of the record desired to be included, in the preparation by the Clerk of the transcript of the record in the above entitled case for the purported appeal attempted to be taken by the plaintiff to the Supreme Court of the United States (the following

paragraphs being numbered consecutively after those set forth in the defendants' first praecipe):

H. Notice of the application for entry of judgment, together with attached form of judgment, filed herein by the plaintiff on August 27, 1948.

I. Judgment entered herein on September 3, 1948, on the opinion of District Judge Hartigan of August 6, 1948.

October 14, 1948.

WILLIAM H. EDWARDS, /s/

M/s

EDWARDS & ANGELL

Attorneys for Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Martin E. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck.

EDWARD T. HOGAN, /s/

LAURENCE J. HOGAN

HOGAN & HOGAN,

Attorneys for Noradel-Agenc Corporation and Industrial Appliance Corporation.

821

MATTHEW W. GORING /s/

S. EVERETT WILKINS, JR. /s/

HINCKLEY, ALLEN, TILLINGHAST & WHEELER,
Attorneys for Builders Iron Foundry and Henry S. Chafetz.

Service hereof is hereby acknowledged

JOSEPH L. BREEN /s/

Ass't U. S. Attorney.

822

Clerk's Certificate to foregoing transcript omitted in printing.

823

In the Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of the Record Necessary for Consideration Thereof—Filed Dec. 17, 1948.

1. Now comes the Appellant in the above cause and for its statement of points upon which it intends to rely in its appeal in this Court adopts the points contained in its Assignment of Errors heretofore filed herein.

2. The entire record in this cause which was filed in this Court pursuant to the appellant's praecipe to the Clerk of the United States District Court for the District of Massachusetts is necessary for the consideration of the foregoing points and appellant designates the entire record as filed in this Court pursuant to said praecipe for printing by the Clerk of this Court.

PHILIP B. PERLMAN
Solicitor General

Dated: December 17, 1948.

824

Certificate

I hereby certify that a true copy of the attached Statement of Points to be Relied upon and Designation of Parts of the Record Necessary for Consideration Thereof was duly served on all appellees on this 17th day of December, 1948, by depositing in the United States mails copies thereof addressed to counsel for appellees.

CHARLES H. WESTON
Special Assistant to the Attorney General

826 - In the Supreme Court of the United States

*Amended Designation of Parts of Record to be
Printed - Filed Dec. 23, 1948.*

Now comes the Appellant in the above cause and, in amendment of its designation of the parts of the record necessary for the consideration of the points upon which the appellant intends to rely in its appeal to this Court and to be printed by the Clerk of this Court, heretofore filed in this Court on December 17, 1948, specifies that there need not be printed the appendix attached to Appellant's Motion For Production of Documents under Rule 34, filed in the District Court of the United States for the District of Rhode Island, and dated April 14, 1948. Said appendix hereby specified as not to be printed constitutes pages 48 to 339, inclusive, of the record now on file with the Clerk of this Court.

Dated: December 23, 1948.

PHILIP B. PERLMAN
Solicitor General

Certificate

I hereby certify that a true copy of the attached Amended Designation of Parts of the Record to be Printed was duly served on all appellees on this 23rd of December, 1948, by depositing in the United States mails copies thereof addressed to counsel for appellees.

CHARLES H. WESTON

Special Assistant to the Attorney General

Supreme Court of the United States

Designation of Additional Parts of Record Material to the Above Appeal—Filed Dec. 21, 1948.

Pursuant to Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, the appellees designate the following additional portions of the record herein as material to the consideration of the appeal herein, viz.:

(a) The portions of the record set out in the praecipe filed by the defendants in the Office of the Clerk of the District Court of the United States for the District of Rhode Island on the 13th day of October 1948.

(b) The portions of the record set out in the second and additional praecipe of the defendants filed in the Office of the Clerk of the District Court of the United States for the District of Rhode Island on the 14th day of October 1948.

And the appellees designate said additional portions of the record, as filed in this Court, pursuant to said two
830 praecipes, for printing by the Clerk of this Court.

By their attorneys,

WILLIAM H. EDWARDS

EDWARDS & ANGELL

HOGAN & HOGAN

HINCKLEY, ALLEN, FILLINGHAM & WHEELER

CHARLES H. TUTTLE

LOREN N. WOOD

WILLIAM H. EDWARDS

LAURENCE J. HOGAN

S. EVERETT WILKINS, JR.

MATTHEW W. GORING

Of Counsel

832 — Supreme Court of the United States

*Amended Designation by Appellees of Parts of Record
to be Printed—Filed Dec. 30, 1948.*

The appellees in amendment of their designation of additional portions of the record desired to be included in the preparation by the Clerk of the transcript of the record in the above entitled case, now designate the following additional parts of the record and request that the same be printed:

1. Appellant's "Statement of points to be relied upon and designation of parts of the record necessary for consideration thereof", dated December 17, 1948.
2. Appellant's "Amended designation of parts of record to be printed", dated December 23, 1948.
3. Appellees' "Designation of additional parts of record material to the above appeal", filed December 24, 1948.
4. This amended designation by Appellees, dated December 29, 1948.

By their attorneys,

WILLIAM H. EDWARDS
EDWARDS & ANGELL
EDWARD T. HOGAN
LAURENCE J. HOGAN
HOGAN AND HOGAN
S. EVERETT WILKINS, JR.
MINCKLEY, ALLEN, THILLY
HAST & WHEELER

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CHARLES H. TUTTLE
LOREN N. WOOD
WILLIAM H. EDWARDS
LAURENCE J. HOGAN
S. EVERETT WILKINS, JR.
MATTHEW W. GORING

Of Counsel

December 29, 1948.

835

Supreme Court of the United States

*Order Postponing Further Consideration of the
Question of Jurisdiction and of the Motion to
Dismiss—December 6, 1948.*

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss is postponed to the hearing of the case on the merits.

LIBRARY
SUPREME COURT, U.S.

No. 416

U.S. Supreme Court, U.S.
FILED
NOV 15 1946
CLERK OF COURT

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

WALLACE & THOMAS COMPANY, INC., ET AL

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MICHIGAN

FILED FOR REPLY TO BRIEF

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 416

THE UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIEMAN COMPANY, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATEMENT AS TO JURISDICTION

(Filed October 4, 1948)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on August 6, 1948. A petition for appeal is presented to the district court herewith, to wit, on October 4, 1948.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of

February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. National City Lines, Inc.*, 334 U. S. 573; *United States v. Columbia Steel Co.*, 334 U. S. 495.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceed-

ings in equity to prevent and restrain such violations. * * *

THE ISSUES AND THE RULING

This is a civil proceeding filed in the district court of the United States for the District of Rhode Island on November 18, 1946, charging six corporations and seven of their officers with conspiring to restrain and monopolize interstate commerce in chlorinating equipment, in violation of Sections 1 and 2 of the Sherman Act. On the day on which this suit was filed a grand jury empaneled by the same district court returned an indictment making substantially the same charges against the same defendants and certain others.

Prior to November 18, 1946, the corporations subsequently indicted had produced some 200,000 pages of documents before the grand jury in obedience to subpoenas duces tecum which the court had sustained against defendants' motions to quash on the ground that the demands of the subpoenas were so broad and indefinite as to constitute an unreasonable search and seizure contrary to the Fourth Amendment. Some 8,000 of the subpoenaed documents, constituting those deemed relevant to the issue of law violation, were photostated, numbered, and indexed by the Government.

Following the decision in *Ballard v. United States*, 329 U. S. 187, the defendants moved to dismiss the indictment upon the ground that the grand jury had been illegally constituted in that women had been intentionally and systematically excluded from the panel. The district court upheld these motions and entered judgment on April 7, 1947, dismissing the indictment. The Government, believing this decision correct, took no appeal from the judgment of dismissal. An order direct-

ing return to the defendants of all documents produced before the grand jury was also entered.

In May 1947, the Government filed a criminal information (No. 6070) making the same charges against the same defendants as those made in the indictment (No. 6055) which had been dismissed. The defendants then moved that all photostats of documents which had been produced before the grand jury be returned to them, and the court, by an opinion filed February 6, 1948, granted defendants' motions. The grounds of the court's decision were that the production of documents pursuant to subpoena constitutes a search and seizure; that such search and seizure become unreasonable when it turns out that the grand jury for whose use the documents were produced had been illegally constituted; and that photostats of documents so produced are fruits of an illegal search and seizure and therefore may not be retained. The court's order, which was made part of the record in No. 6055, directed return of the photostats on or before April 20, 1948.

On April 14, 1948, the court ruled on a motion made by the defendants for an order dismissing the criminal information or, in the alternative, expunging all portions thereof based on knowledge obtained from documents produced before the grand jury, and for an order precluding the Government from using in any way or for any purpose any knowledge or information obtained from these documents. The court denied the motion to dismiss or expunge upon the ground that it could not presently say that the Government might not be able to obtain evidence in support of its allegations from sources other than the documents produced before the grand jury. As to the motion to preclude, the

5
court held that its opinion of February 6, 1948, was controlling and on April 20, 1948, it entered an order of preclusion in the broad language of defendants' motion.

In the civil case, the Government on May 14, 1948, filed a motion under Rule 34 of the Federal Rules of Civil Procedure for the production by defendant corporations of the documents which they had produced before the grand jury and which had been photostated by the Government, as identified in an attached schedule. Later the Government procured the issuance of subpoenas duces tecum, directed to the corporations previously indicted, for the documents produced before the grand jury and photostated by the Government, as identified by attached schedules. After the filing of motions to quash these subpoenas the district court on May 24, 1948, denied the Government's motion for the production of documents under Rule 34 and granted the motions to quash the subpoenas duces tecum. Formal orders giving effect to the court's rulings were entered on June 1, 1948.

At the trial the Government stated that the documents for which subpoenas had been issued constituted substantially all of the Government's case and that such evidence as it had apart from these documents was so incomplete and piecemeal as to be virtually meaningless. The Government called upon the defendants to produce the subpoenaed documents and moved the court to vacate its orders quashing the subpoenas. When the court denied this motion, the Government put on the stand an attorney who had participated in the grand jury proceedings and sought to elicit testimony from him as to the contents of the documents produced before the grand jury. After the court had ex-

cluded such testimony, the Government filed, by way of an offer of proof, an affidavit of counsel averring that the subpoenaed documents are relevant and material to the issues in the case and "constitute substantially all of the Government's evidence in this case." The Government then rested and asked the court to enter judgment for the plaintiff. Defense counsel stated that, in the existing posture of the case, the defendants were not called upon to present any evidence and would not do so.

The court, at the conclusion of the trial, took the case under advisement. It filed an opinion on August 6, 1948, which quotes extensively from the transcript of the trial, states that the reality "practically amounts to non-prosecution" by the Government, and directs entry of judgment dismissing the action without prejudice.

THE QUESTIONS ARE SUBSTANTIAL

The Court's rulings at the trial excluded, or prevented the Government from presenting, substantially all evidence which it had in support of the allegations of its complaint. The sole basis for these rulings was the interpretation which the trial court placed upon the scope and application of the Fourth Amendment. The appeal, in challenging this interpretation, presents two related questions of constitutional law which are of substance and of general public importance.

The first of these questions is whether there is an unreasonable search or seizure within the meaning of the Fourth Amendment when documents are produced before a grand jury in response to subpoenas which are sufficiently definite in their demands and which call for documents the Govern-

ment is entitled to have produced, if it turns out that the grand jury has been illegally constituted.

In considering the prohibitions of the Fourth Amendment, it is necessary to distinguish between cases of actual search and seizure and cases of the "figurative" or "constructive" search involved in the production of books or records in obedience to judicial process (*Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 202). A true search or seizure directly invades rights of privacy which the Fourth Amendment is designed to secure. The intrusion, to be reasonable and therefore permissible, must have legal sanction. Such sanction is given when the search is authorized by a valid search warrant or by those special conditions which the law has long recognized as justifying search or seizure without a warrant.

There is, on the other hand, no actual search or seizure when documents are produced pursuant to legal process. To the extent that this may be a "constructive" search (cf. *Boyd v. United States*, 116 U. S. 616, 634-635), the rights of privacy protected by the Fourth Amendment are infringed only if the demands made through the medium of judicial process in themselves exceed the limits of reasonableness. Thus the Fourth Amendment may be violated if the demands of a subpoena are so sweeping that they can be characterized as a fishing expedition embarked upon on the possibility that it may uncover evidence of crime. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-306; *Hale v. Henkel*, 201 U. S. 43, 76-77. But where, as in the present case, "a writ, suitably specific and properly limited in its scope, calls for the production of documents which * * * the party procuring its issuance is entitled to have

produced"; there is no unreasonable search and seizure within the meaning of the Fourth Amendment. *Wilson v. United States*, 221 U. S. 361, 376. In this situation, the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth" in the things required to be produced. *Oklahoma Press Publishing Co. v. Walling, supra*, at p. 208.

We point out that if the Government prevails in its contention that no constitutional right was violated by the production of documents before the illegally constituted grand jury, it follows that the Government might properly utilize customary judicial process and procedure to obtain these documents.

If the production of documents before the grand jury is held to constitute a technical violation of the Fourth Amendment, the appeal will present the constitutional question whether the case comes within the rule requiring the complete suppression of documents or information which the Government has obtained in violation of the Fourth Amendment (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385). Cf. *Nardone v. United States*, 308 U. S. 338. The reasons for the rule are that complete suppression is necessary to give substance to the Amendment's prohibitions and that the Government should not be permitted to profit from its own wrong.

Neither the rule nor the reasons for it apply where the Government has not been a party to the illegal action. It may put in evidence documents received from a private party who had obtained them by theft or trespass. *Burdeau v. McDowell*, 256 U. S. 465. In the present case the prosecuting officers of the United States had no part in the only

element of wrongfulness, the improper empaneling of the grand jury. The composition of the panel from which the grand jury was drawn was determined by the district court or officials appointed by the court. While prosecuting officers of the Government participated in obtaining subpoenas calling for production of documents before the grand jury, they are not thereby charged with responsibility for the grand jury's improper constitution. It had been summoned by the court and had *de facto* existence. In these circumstances, the Government's prosecuting officers cannot be held to the duty of deciding for themselves that the grand jury had been improperly constituted. Cf. *Blair v. United States*, 250 U. S. 273, 282.

The Government believes that to preclude it forever from access to or use of documents which had once been produced before a wrong body, i. e., an improperly empaneled grand jury, would be a travesty of justice. Not only are the questions presented by the appeal substantial but they concern vital aspects of administration of criminal justice.

Possibly the defendants will contend that the order of preclusion entered in No. 6070 (the criminal information) is *res judicata* and forecloses the Government from using in any manner whatsoever the documents produced before the grand jury, and that the constitutional questions to which we have referred will therefore not be reached on appeal. But irrespective of whether the order of preclusion is limited to the proceeding in which it was entered, it is not conclusive in another proceeding between the same parties. Only final orders may be relied upon as *res judicata*. *Merriam v. Saalfeld*, 241 U. S. 22, 28; *Smith v. McCool*, 16 Wall. 560, 561; *Reed*

v. Proprietors of Locks and Canals, 8 How. 274, 294. The criminal information has not been dismissed and the order of preclusion is itself not a final order. Orders on motions to suppress, entered after an indictment has been returned or an information filed, are not appealable. *Cogen v. United States*, 278 U. S. 271; *United States v. Rosenwasser*, 145 F. 2d 1045 (C.C.A. 9).

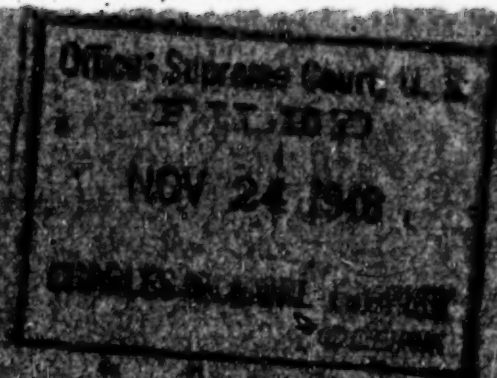
We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

(S.) PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 4, 1948.

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No. 416

In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

WALLACE & THORNTON CO., INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF PUERTO RICO

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO
DISMISS

In the Supreme Court of the United States

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No. 416

UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIERNAN CO., INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF RHODE ISLAND

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS

1. THE APPEAL WAS FROM THE FINAL JUDGMENT OF THE DISTRICT COURT

Appellee's motion to dismiss asserts (pp. 2-3) lack of jurisdiction of the appeal upon the ground that the judgment dismissing the cause was entered on September 3, 1948, whereas the appeal taken on October 4, 1948, was from a judgment of dismissal entered on August 6, 1948. We submit that this contention is wholly without merit.

(1)

The district court in its opinion of August 6, 1948, directed entry of a judgment of dismissal. On the same day the clerk of the district court entered a judgment of dismissal as follows:

OPINION filed and **JUDGMENT** entered dismissing the action without prejudice and the Government's "Request" for judgment and relief prayed for in the complaint is denied.

Under Rule 58 of the Federal Rules of Civil Procedure, this judgment constituted the judgment in the cause. This Rule provides that when a court directs that all relief be denied, the clerk of the court shall promptly enter judgment. The Rule further provides that the clerk's notation of a judgment in the civil docket as provided by Rule 79 (a) "constitutes the entry of the judgment." Since, therefore, the judgment dismissing the present action was entered when the clerk made the required entry of judgment on August 6, 1948, the parallel judgment later entered by

The concluding paragraphs of the opinion read:

"The Government's request for judgment and relief prayed for in the complaint is denied and judgment may be entered dismissing the action without prejudice.

"It is so ordered."

Rule 79 (a) requires the clerk to keep a book known as "civil docket" in which he shall enter each civil action to which the Rules are made applicable. The Rule provides, among other things, that "all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number."

the district judge is without legal significance. Not only had the district judge no power, under the Rules, to supersede the judgment previously entered by the clerk, but no such intent on his part can properly be inferred. In signing a formal judgment on September 3, 1948, the district judge acted at the request of counsel for the United States.³

But even if the judgment of dismissal was, in fact, entered on September 3, 1948, any defect in the appeal by reason of failure to refer to this judgment is "so insubstantial" and "of such a technical nature" that it must be disregarded. *Hoiness v. United States*, No. 20, this Term, slip opinion 3-4.⁴ As in the case just cited, whether the judgment of dismissal was entered on one or the other of the two dates in question, the appeal was timely,⁵ the assignment of errors identifies the issues sought to be reviewed, and the scope of review is the same.

³ Government counsel—members of the staff of the Boston office of the Antitrust Division—made this request because they had been informed by the district judge, at least as counsel understood, that no entry of judgment had been made pursuant to the court's opinion of August 6, 1948.

⁴ While in this case the Court gave weight to the policy expressed in Section 954 Revised Statutes, and while this section was repealed as of September 1, 1948 (Pub. L. 773, 80th Cong., Sec. 39), the repeal was for the reason that the provisions of the section were covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure (H. Rep. No. 308, 80th Cong., 1st Sess., p. A239).

⁵ The appeal was taken on October 4, 1948, within the sixty-day time limit from either date.

2. THE JUDGMENT DISMISSING THE ACTION WAS NOT A JUDGMENT OF NONSUIT ENTERED AT THE REQUEST OF THE PLAINTIFF

We submit that there is no merit in appellees' contention (motion pp. 4-15) that, in substance, the plaintiff had requested entry of a judgment of nonsuit and that for this reason the judgment is not appealable.

The purpose of a voluntary nonsuit is to enable the plaintiff to institute a new suit on the same cause of action. Here what the plaintiff sought was, not opportunity to begin a new suit, but entry of a judgment disposing of the case so that there might be appellate review of the rulings barring proof of the plaintiff's case. An appeal obviously lies when judgment is entered against a plaintiff after evidence material to its cause has been excluded. We submit that an appeal equally lies from the judgment where, as here, the plaintiff had foreknowledge that the trial court's rulings would be adverse and these rulings excluded substantially all the plaintiff's evidence.

Appellees rely upon the statement in the district court's opinion that: "The reality here practically amounts to non-prosecution." We assume, as do appellees (motion p. 8), that the basis for this conclusion was the statement of Government counsel that evidence other than that which had been excluded might "conceivably" be obtained by the Government "after an investigation coex-

tensive in time and labor with that heretofore undertaken." What such a coextensive investigation would mean, in time and labor, is indicated by the facts set forth below.⁶ The more thorough the culling of the incriminating evidence in the grand jury proceedings which climaxed the prior investigation, the lesser the likelihood of obtaining adequate other evidence in a new investigation. Furthermore, if the district court's present rulings have as broad a scope as that ascribed to them by appellees, the new investigation would have to be by lawyers not contaminated with knowledge obtained through participation in the grand jury proceedings, in other words, by lawyers not familiar with the case.

The Government, instead of following this hard and dubious course, elected to prosecute the pending case to its end. This is the reverse of consenting to dismissal of its suit. We submit; therefore, that the "reality" amounts to prosecution, not "non-prosecution."

Appellees imply that the Government improperly invited or maneuvered for the judgment

⁶ Investigation of the question of defendants' violation of the antitrust laws began in 1942 and ended with the return of the criminal indictment in November 1946. In the course of the investigation four members of the staff of the Antitrust Division examined the defendants' books and records from time to time during a seven-months' period, and Government lawyers participated in the grand jury investigation during a period of over six months. See affidavit of Chalmers Hamill, pp. 1-3 (item 8 of Government's praecipe).

against itself. But there was nothing improper in Government counsel stating candidly to the Court and appellees that the documentary evidence excluded by the district court's rulings was essential to the Government's case, and that the Government could not proceed unless and until these rulings were reversed on appeal. Nor in such circumstances was there anything improper in Government counsel asking the Court to enter a final judgment so that the case could be appealed—even though it was obvious that the judgment would be against the Government. The alternative of introducing such fragmentary other evidence as the Government might have, knowing that it was insufficient to make out a case, and appealing from the adverse judgment which would then be entered, would have been time-consuming shadow-boxing. We submit that the course pursued by Government counsel was the only reasonable method of protecting the public interest in a situation in which the rulings of a single district judge would, if not reversed, have the practical effect of giving immunity to alleged violators of the antitrust laws, and that the frankness of counsel in stating what they were trying to do is to be commended rather than criticized.

But even under the district court's theory of nonprosecution, this Court has jurisdiction of the appeal. It is well settled that a judgment dismissing a cause for want of prosecution is a "final" judgment from which an appeal lies.

Wilson v. Republic Iron & Steel Co., 257 U. S. 92, 96; *Ruff v. Gay*, 67 F. 2d 684 (C. C. A. 5), affirmed without discussing this point, 292 U. S. 25; *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774 (C. C. A. 10). The facts here are precisely like those in the *Bowles* case, where appeals were entertained from judgments of dismissal which the trial court had entered after it had sustained motions to suppress the evidence presented by the plaintiff and after plaintiff's counsel had advised the court that he had no additional evidence to present.

It is immaterial that the judgment which was entered in the instant case dismissed the action "without prejudice." Such a judgment is "final" and appealable. *United States v. National City Lines, Inc.*, 334 U. S. 573.

3. THE APPEAL PRESENTS SOLELY THE VALIDITY OF THE DISTRICT COURT'S RULING IN THE INSTANT CIVIL PROCEEDINGS

We submit that there is no merit in appellees' contention (motion pp. 16-36) that the appeal is an attempt to obtain, by indirection, appellate review of rulings made by the district court in the two criminal proceedings (Nos. 6055 and 6070). The appeal attacks only the rulings in the civil case. Since the Government has not assigned as error any ruling made in the criminal cases, error in any such ruling is not within the issues presented by the appeal. Clearly the right to seek

correction of error committed in the present cause is not destroyed by reason of the fact that a determination by this Court that there had been such error might make it apparent that certain rulings of the district court in the criminal cases had also been erroneous.

Appellees also suggest (motion, pp. 22, 27, 33-34) that certain rulings in the criminal case are *res judicata* as to the issues presented by the appeal. The ruling of greatest significance in this connection was briefly discussed from the standpoint of *res judicata* in the next to the last paragraph of the Government's statement as to jurisdiction filed in support of its appeal. We deem it unnecessary to discuss this question further, or to discuss it in relation to Rule 41 (c) of the Federal Rules of Criminal Procedure, since the question goes to the merits of the issues raised by the appeal, not to jurisdiction of the appeal.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIERNAN Co., INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court dismissing the complaint without prejudice at the close of trial (R. 232-242) has not yet been reported.

JURISDICTION

The judgment of dismissal was entered August 6, 1948 (R. 242).¹ The appeal was taken on October 4, 1948 (R. 242-244). The jurisdiction of this

¹ This was the date on which the clerk of the court entered judgment in accordance with the district court's opinion. A formal judgment was signed and entered on September 3, 1948 (R. 376).

Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d Sess.

QUESTIONS PRESENTED

1. Whether a judgment dismissing the complaint without prejudice after the government stated that all substantial evidence which it then had available had been excluded by the trial court's intermediate ruling is appealable as a final judgment which was not invited by the government.

2. Whether an order for suppression of evidence in a criminal information proceeding which has not been terminated is *res judicata* on the right of the government to use such evidence in a civil suit.

3. Whether the fact that documents have been produced pursuant to a reasonable subpoena before a grand jury subsequently found to have been defectively constituted in the circumstances of this case precludes the Government from using information obtained from such documents in order to have the documents produced before a valid judicial tribunal under valid judicial process.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Fourth Amendment provides in part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

SEC. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

* * * After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 41(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

* * * A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable

cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. * * *

STATEMENT

This is a civil proceeding filed in the United States District Court for the District of Rhode Island on November 18, 1946, charging six corporations and seven of their officers with conspiring to restrain and monopolize interstate commerce in chlorinating equipment; in violation of Sections 1 and 2 of the Sherman Act (R. 8-27). On the day on which this suit was filed, a grand jury empaneled by the same district court returned an indictment (No. 6055) making substantially the same charges against the same defendants and certain others (R. 251-272).

Prior to November 18, 1946, the corporations subsequently indicted had produced some 200,000 pages of documents before the grand jury (R. 49-50) in obedience to subpoenas *duces tecum* which the court had sustained against defendants' motions to quash on the ground that the demands of the subpoenas were so broad and indefinite as to constitute an unreasonable search and seizure contrary to the Fourth Amendment (R. 82). Some

8,000 of the subpoenaed documents, constituting those deemed relevant to the issue of law violation, were photostated, numbered, and indexed by the Government (R. 35-36, 44).

Following the decision in *Ballard v. United States*, 329 U. S. 187, the appellees moved to dismiss the indictment upon the ground that the grand jury had been illegally constituted in that women had been intentionally and systematically excluded from the panel. The district court upheld these motions and entered judgment on April 7, 1947, dismissing the indictment (R. 56-70). The issue turned on Section 37 of Chapter 700 of the Laws of Rhode Island, 1939, which provides that "Whenever the jury commissioner shall determine that the accommodations and facilities of the superior courthouse in any county are such as to allow of the service of women as jurors", he should certify such fact to the Secretary of State and include women in the panel of those summoned for jury duty. After reviewing the facilities available in the federal building in Rhode Island, the court expressed the opinion that while they "are not the best accommodation in this day and age that should be available for women, called upon to perform the public duty of jury service, nevertheless, they are accommodations and facilities that could be used." (R. 68-69.) Although expressing doubts as to the validity of its decision (R. 69), the court dismissed the indictment because of the failure to in-

clude women on the panel of grand jurors (R. 70). The Government took no appeal from the judgment of dismissal. The court also issued orders directing that the documents, which had been produced before the grand jury and impounded by order of the court, be released from the impounding order and returned to the appellees (R. 72-75).

In May, 1947, the Government filed a criminal information (No. 6070) making the same charges against the same defendants as those made in the indictment (No. 6055) which had been dismissed (R. 272-294). The appellees then moved that all photostats of documents which had been produced before the grand jury be surrendered to them (R. 76-80), and the court, by an opinion filed February 6, 1948 granted appellees' motions (R. 81-85).² The court stated in its opinion that "the subpoenas did not violate the Fourth Amendment and the Government was entitled to have the documents produced for presentation to a legal grand jury" (R. 84). It held, however, that the production of documents pursuant to subpoena constituted a search and seizure; that when it turned out that the grand jury for whose use the documents were produced had been illegally constituted, the search and seizure became unreasonable; and that photostats of the documents so produced were the fruits of an illegal search and seizure which could not be retained by

²The opinion is reported as *In re Wallace & Tiernan Co., Inc.*, 76 F. Supp. 215.

the Government (R. 84-85). The court's order, which was made part of the record in No. 6055 (the indictment proceedings), directed surrender of the photostats on or before April 20, 1948 (R. 85).

With respect to the information, appellees moved for an order (1) dismissing the criminal information; or (2) in the alternative expunging all portions thereof which were based on knowledge obtained from documents produced before the grand jury; and (3) for "an order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence" obtained from the documents (R. 87-91). The court denied the motion to dismiss or expunge on the ground that it could not then say that the government might not be able to procure evidence in support of its allegations from sources other than documents produced before the grand jury. As to the motion to preclude, the court stated that its opinion of February 6, 1948 was controlling (R. 91-95).

The Government moved for a stay of entry of an order on that opinion, and for a stay of execution of the orders issued in No. 6055, directing return of the photostats (R. 97, 115). Counsel for the Government pointed out that the court had theretofore declined to rule on the extent to which the Government could use the documents produced before the grand jury in the civil case, and called attention to the fact that the Government had moved in the

civil case for the production of the documents (R. 97-98). Counsel stated that, if the court adhered to its position and ruled against the Government in the civil case, it was the Government's intention to review that ruling by the only avenue of appeal open to it, i.e., an appeal in the civil case (R. 101-104). The Government also asked the court not to take any step in the information proceeding which might prevent correction of an error, if the appellate court should hold that there had not been an unlawful search and seizure (R. 115, 117, 119, 120, 125). In the course of the argument, the court stated that the order on its decision with respect to the motion to preclude would prevent the use of the documents "only in this action," i.e., only with respect to the criminal information (R. 117). The court further stated, "I don't see how this is going to prejudice you in some other case, and this Court is only concerned with 6070 at this time, as I understand it" (R. 126). On April 20, 1948, the court entered an order which provided that its opinion of February 6th was controlling as to paragraph 3 of the appellees' motion, i.e., the request to preclude the use for any purpose of the information obtained from the documents produced before the grand jury (R. 95-96).

In the civil case, the Government filed a motion under Rule 34 of the Federal Rules of Civil Procedure for the production by the defendant corporations of the documents which had been produced

before the grand jury, and which had been photostated by the Government as identified in an attached schedule (R. 36-46). Subsequently, the Government procured the issuance of subpoenas *daces tecum* directed to the corporations previously indicted, including corporations not made parties to the civil suit for the production of documents theretofore submitted to the grand jury and photostated by the Government as identified by attached schedules (R. 136-181). Appellees moved to quash the subpoenas (R. 182-192). Early in the argument on these motions, the court indicated that it intended to adhere to its previous rulings, to deny the Government's motion for production of documents under Rule 34, and to quash the subpoenas (R. 193-194). The Government then stated that it wished the case to be set for trial so that the Government could make a statement of its inability to proceed in view of the trial court's rulings (R. 196-197). In response to statements by counsel for the defense that they would need more time if there were to be a trial in the usual sense of the term, government counsel stated that "in view of the rulings of the Court announced today, the Government doesn't intend to offer evidence if a date is granted as we have requested" (R. 198). An opinion on the motion for discovery was filed on May 26, 1948 (R. 294-304), and formal orders giving effect to the court's rulings on the motion for production of testimony, and on appellees' motions to

quash the subpoenas were entered on June 1, 1948 (R. 201-202).

At the trial, the Government stated that the documents for which subpoenas had been issued constituted substantially all of the Government's case, and that such evidence as it had apart from these documents was so incomplete and piecemeal as to be virtually meaningless (R. 206-207). The Government called upon the defendants to produce the subpoenaed documents, and moved the court to vacate its orders quashing the subpoenas (R. 207, 210). When the court denied these motions (R. 209, 210), the Government put on the stand an attorney who had participated in the grand jury proceedings, and sought to elicit testimony from him as to the contents of the documents produced before the grand jury (R. 210). After the court had excluded such testimony (R. 213-214), the Government filed, by way of an offer of proof (R. 214, 218), an affidavit of counsel averring that the subpoenaed documents were relevant and material to the issues in the case, and "constitute substantially all of the Government's evidence in this case" (R. 231). The affidavit further stated (R. 231-232):

the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint, and, although conceivably such evidence might be obtained, that could only be done after an investigation co-

extensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents.

The Government then rested, and asked the court to enter judgment for the plaintiff (R. 220). Defense counsel stated that, in the existing posture of the case, the defendants were not called upon to present any evidence and would not do so (R. 222-225, 227-228).

The court, at the conclusion of the trial, took the case under advisement (R. 228-229). It filed an opinion on August 6, 1948, which quotes extensively from the transcript of the trial, states that the reality "practically amounts to non-prosecution" by the Government, and directs entry of judgment dismissing the action without prejudice (R. 232-242).

ASSIGNMENT OF ERRORS

1. The court erred in denying the Government's motion under Rule 34 of the Federal Rules of Civil Procedure for the production by defendant corporations of certain specified documents.

2. The court erred in denying the Government's motion for the production by defendant corporations of photostatic copies of documents previously surrendered by the Government in obedience to an order of the court.

3. The court erred in quashing the subpoenas *duces tecum* issued in May 1948 to defendant cor-

porations and certain other corporations and in denying the Government's motion to vacate the orders of the court quashing these subpoenas.

4. The court erred in excluding secondary evidence as to the contents of any document which had been produced before the grand jury which returned an indictment (No. 6055) against the defendants.

5. The court erred in basing each of the rulings covered by the errors assigned in Nos. 1-4, inclusive, upon the ground that the production of documents, pursuant to subpoenas *duces tecum*, before a grand jury which was improperly constituted violates the Fourth Amendment.

6. The court erred in basing each of the rulings covered by the errors assigned in Nos. 1-4, inclusive, upon the ground that the prior production of documents, pursuant to subpoenas *duces tecum*, before an improperly constituted grand jury operated to bar the Government from obtaining these documents by appropriate legal process or procedure in another proceeding and from using the documents, evidence as to their contents, or information derived therefrom, as evidence in another proceeding.

7. The court erred in stating that when the Government rested its case at the trial after having been prevented by the court's rulings from presenting all evidence which it had which would establish the allegations of its complaint, the course pursued

by the Government "practically amounts to non-prosecution".

8. The court erred in entering judgment dismissing the Government's complaint.

SUMMARY OF ARGUMENT

I

The judgment dismissing the complaint without prejudice is clearly a final judgment since it terminates the cause in which it was entered. *Wecker v. National Enameling Co.*, 204 U.S. 176, 182. The only question with respect to the appealability of such judgment is whether it was voluntarily sought by the Government so as to come within the principle that one who invites error may not complain of such error on appeal.

The history of the various proceedings in the criminal and civil causes establishes that the judgment of dismissal was not the result of the Government's voluntary action. The Government consistently sought to obtain the evidence which it needed to prove its case and submitted to a judgment of dismissal only because the rulings of the district judge barred it from producing substantially all the evidence which it had available. Government counsel was able to state that there would be no trial in the usual sense only because he correctly anticipated that at the trial the Court would adhere to its previous rulings which barred the Government from proving its case.

The fact that the dismissal was without prejudice does not show that the dismissal was voluntarily sought by the Government. The Court apparently dismissed the action without prejudice because Government counsel stated that "conceivably" additional evidence might be obtained after another extensive investigation. That the Court, believing its rulings on evidence to be correct, decided not to grant complete immunity to appellees for their illegal acts in the event that the Government should discover new evidence, certainly does not establish that the Government consented to the dismissal of an action which it could have proved immediately if the Court had not improperly excluded the evidence then available.

II

There is no issue of *res judicata* in this case. The orders entered in the indictment proceedings merely directed the return of the original documents and surrender of the photostats; they did not bar the further use of such evidence. An order for return of evidence is not necessarily an order of preclusion. *Zap v. United States*, 328 U.S. 624, 629; *In re Sand Laboratories*, 115 F. 2d 717, 718 (C.A. 3), certiorari denied, 312 U.S. 688.

Although the order entered in the information proceeding may be read so as to preclude the Government from using the documents and information obtained therefrom for any purpose, it is at least debatable whether Rule 41(e) of the Federal

Rules of Criminal Procedure was ever intended to authorize an order that would have binding effect in a later civil case of this character, and it is abundantly plain from the record here that the District Judge never intended his order in the information proceeding to have conclusive effect in the civil case. However, apart from other possible considerations, that order is not *res judicata* on the issues presented by this appeal because it is not a final order. The information proceedings have not been concluded either by conviction or dismissal, and, so long as the proceedings are pending, there is always the possibility that the district judge will see the error of his reasoning and vacate the erroneous order. Accordingly, even if the doctrine of *res judicata* would otherwise be applicable, the order cannot have binding effect in another action until it acquires finality. *Merriam v. Saulfield*, 241 U.S. 22, 28; *Smith v. McCool*, 16 Wall. 560, 561.

III

On the merits this case presents the question whether the fact that documents have once been produced before a grand jury subsequently found to have been defectively constituted precludes the Government from thereafter using information obtained from such documents in order to have the documents produced before a valid judicial tribunal pursuant to valid judicial process. The District Court held that the documents in effect

acquired immunity because their production, in the first instance pursuant to subpoena constituted a search and seizure, and that, when the grand jury was found to be invalid, such search and seizure became unreasonable with the result that neither the documents themselves nor the information obtained therefrom could be utilized by the Government.

A. Perhaps the simplest answer to this line of reasoning is that the invalidity in the composition of the grand jury did not render the subpoenas illegal. The grand jury had more than *de facto* existence and its proceedings had legal validity. Even indictments returned by that grand jury were at most voidable, but not void. *United States v. Gale*, 109 U.S. 65, 71; *Kaizo v. Henry*, 211 U.S. 146. Moreover, process was issued by the court, not by the grand jury, and, certainly, the defect in the composition of the grand jury did not invalidate that process.

If the production of books pursuant to subpoena does constitute a search, there was in this case a valid search. Indeed, failure to produce the books before the grand jury, notwithstanding its possible defectiveness, would have furnished the basis for valid contempt proceedings. *Blair v. United States*, 250 U.S. 273.

B. Actually, the production of the documents before the grand jury pursuant to subpoenas which, as the District Court found, were reasonable in

scope and which called for documents which the Government was entitled to have produced was not a search and seizure within the meaning of the Fourth Amendment. The District Court failed to note the distinction between an actual and a constructive search. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 203.

In the case of a true search, where premises are entered and a search made, the act of entering to search is in itself a breach of privacy and therefore from its commencement a matter within the scope of the Fourth Amendment. Whatever the nature of the articles sought, even if they be property belonging to the Government itself, the intrusion into the privacy of the home or other premises must have legal sanction. Such sanction is given when the search is authorized by a valid warrant or by those special conditions which the law has long recognized as justifying search or seizure without a warrant. The fact that the documents sought are those which the Government has a right to see is immaterial if the original intrusion of privacy is illegally made, for it is the right of privacy which the Fourth Amendment is designed to protect. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385.

No right of privacy, no castle wall is breached by an order of a court directing a person to produce specified records before a judicial tribunal. When documents are subpoenaed there is in actuality

neither a search nor a seizure. But, since the primary purpose of the Fourth Amendment is to protect the right of privacy, such cases as *Boyd v. United States*, 116 U.S. 616, and *Hale v. Henkel*, 201 U.S. 43, have said, expressly or implicitly, that where judicial process goes beyond the point of reasonableness there is, in effect, an invasion of privacy and thus a violation of the Fourth Amendment. The important point in all these decisions, however, is that this Court speaks in terms of the Fourth Amendment only to the extent to which the judicial process is unreasonable, i. e., to the extent that it seeks to obtain information which the Government has no right to secure or to the extent that the subpoena is so broad as to constitute a fishing expedition without direction. The right of privacy is not reached at all unless the subpoena goes beyond the bounds of proper Governmental action. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208.

In the present case it was judicially determined that the subpoenas for production of records before the grand jury were reasonable, that they were specific and that they called for documents which the Government had a right to have produced. Hence the issuance of the subpoenas and the production of the documents pursuant thereto did not violate the appellees' rights of privacy. The subpoenas never reached the area protected by the Fourth Amendment.

C. Even assuming that the production of documents pursuant to subpoena before a defectively constituted grand jury could be deemed a violation of the Fourth Amendment, the District Court erred in holding that the Government should for that reason be precluded from using information obtained from such documents under the rule of *Weeks v. United States*, 232 U. S. 383, and *Silverthorne Lumber Co. v. United States*, 251 U. S. 385.

The rule of suppression is based on the theory that suppression of evidence is the only effective sanction against wrongful invasion of privacy by Government officers and that, as between a defendant whose rights have been unlawfully invaded and the Government which has done the wrongful invading, the Government should not be allowed to profit by its own wrong. In this case, the prosecuting officials of the United States had no part in the only element of wrongfulness found by the District Court, the improper impanelling of the grand jury. The composition of the panel from which the grand jury was drawn was determined by the District Court or officials appointed by the District Court. While prosecuting officers of the government participated in obtaining subpoenas calling for production of documents before the grand jury, they were not charged with responsibility for the grand jury's constitution. The Government was under a duty to take the grand jury as the Court had constituted it and to produce before

that grand jury such evidence as it could obtain by issuance of subpoenas proper in themselves.

Furthermore, the appellees have already been granted redress for the alleged illegality in the manner of impanelling of a grand jury. That remedy, dismissal of the indictment, is in itself an extraordinary remedy, available to defendants without any showing that they have been prejudiced by the defective composition of the grand jury. *Ballard v. United States*, 329 U. S. 187. To add to this remedy the additional sanction of precluding the use of documents produced before the grand jury and the use of any information obtained from such documents and thus, in most instances, to grant immunity to law violators for a technical error of law which did not prejudice them would be a travesty of justice which is required neither by reason nor authority.

ARGUMENT

I

THE JUDGMENT IN THIS CASE IS A FINAL JUDGMENT WHICH WAS NOT VOLUNTARILY SOUGHT BY THE GOVERNMENT. IT IS, THEREFORE, APPEALABLE

In their motion to dismiss this appeal, appellees contended that the judgment appealed from is, in substance, a judgment on a motion for a voluntary non-suit, and therefore, not appealable.³ This

³ Appellees also asserted that this Court lacked jurisdiction on the ground that the appeal was taken from a judgment of dismissal entered on August 6, 1948, whereas, in appellees' view, the judgment dismissing the cause was entered on Sep-

Court directed that the motion to dismiss be argued at the same time as the argument on the merits (R. 382). We, therefore, discuss first the jurisdictional issues raised by the appellees.

A. The Judgment Appealed from is a Final Judgment

Although the judgment in this case directs that the complaint be dismissed without prejudice, the judgment is clearly final. *United States v. National City Lines, Inc.*, 334 U. S. 573. This Court has frequently ruled that the mere fact that a judgment of dismissal may not be a bar to a subsequent action does not detract from the finality of the judgment which concludes the particular proceeding in which it was entered. Thus, in *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 39, this Court upheld the appealability of a judgment of involuntary non-suit. In *Wilson v. Republic Iron & Steel Co.*, 257 U. S. 92, 96, it took jurisdiction of an appeal from an order dismissing an action after removal for failure to pay the costs of a previous action. In *Wecker v. National Enameling Co.*, 204 U. S. 176, 182, it upheld the appealability of a judgment of dismissal entered on plaintiff's refusal to produce evidence after denial of his motion to remand to the state court, stating that it was unnecessary to determine whether the judgment

tember 3, 1948. However, in view of the decision of this Court in *Hoiness v. United States*, 335 U. S. 297, appellees have withdrawn such ground of objection.

would or would not bar a future action, since it definitely concluded the case before the court.

B. The Judgment of Dismissal was not Voluntarily Sought by the Government

Judgments on motions for voluntary non-suits have been held to be unappealable, not on the ground that such judgments are not final, but on the principle that one who invites error may not complain of such error on appeal. *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 39; *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296, 297 (C.A. 4). The sole question affecting the jurisdiction of this Court is, therefore, whether the dismissal of this action was sought by the Government so as to bring this case within that ruling.

The history of the various proceedings in the civil and criminal causes, as summarized in the Statement, *supra*, establishes that the judgment of dismissal was not the result of the Government's voluntary action. Throughout the various proceedings, the Government steadfastly and consistently sought one result, to obtain for use at the trial of this case the documents produced before the grand jury which it needed to prove the allegations of the complaint. At every step, the Government made it clear that it proposed to go ahead with the trial if it could obtain those documents, but that it would be unable to prove its case without them. The fact that, after the motion to⁹ produce testi-

mony had been denied, and the subpoenas had been quashed. Government counsel correctly anticipated that, at the trial, the Judge would adhere to the views he had previously expressed on four different occasions, and that Government counsel was thus able to assure the defense that, in the absence of the documents, there would be no trial in the usual sense of the term, does not show that the Government invited the judgment of dismissal. An appeal obviously lies when judgment is entered against a plaintiff after evidence material to its cause has been excluded. We submit that an appeal equally lies where, as here, the plaintiff has foreknowledge that the trial court's rulings will be adverse and that these rulings will exclude substantially all of the plaintiff's evidence.

This is not a case in which the plaintiff refused to present evidence which it had available in order to get a judgment which would enable it to test on review the intermediate rulings of the trial court. Even in such a situation, this Court has held that a judgment dismissing the action for failure to produce evidence after denial of a motion to remand is an appealable order. *Wecker v. National Enameling Co.*, 204 U.S. 176, 182.⁴ The instant

⁴The holding of the *Wecker* case is inconsistent with the ruling in *Rudolph v. Sensener*, 39 App. D.C. 385, on which appellants rely. The *Rudolph* case, therefore, cannot be deemed valid authority. But even if it were correct, its reasoning would be inapplicable to this case, for here the Government, in the face of the District Court's ruling, had no substantial evidence which it could have produced. The lack of evidence was not a result of the Government's own choice.

case is even stronger, for here the rulings of the District Court made it impossible for the Government to prove its case, and the Government had no choice but to submit to dismissal of its action.

There was nothing improper in the act of Government counsel in stating candidly to the court and appellees that the documentary evidence excluded by the district court's rulings was essential to the Government's case, and that the Government could not proceed unless and until these rulings were reversed on appeal. Nor in such circumstances was there anything improper in Government counsel asking the Court to enter a final judgment so that the case could be appealed, even though it was obvious that the judgment would be against the Government. The alternative of introducing such fragmentary other evidence as the Government might have, knowing that it was insufficient to make out a case, and appealing from the adverse judgment which would then be entered, would have been a futile and time-consuming gesture. We submit that the course pursued by Government counsel was the only reasonable method of protecting the public interest in a situation in which the rulings of a single district judge would, if not reversed, have the practical effect of giving immunity to alleged violators of the antitrust laws. The frankness of counsel in stating what they were trying to do is to be commended rather than criticized. The facts here are precisely like those in

Bowles v. Beatrice Creamery Co., 146 F. 2d 774 (C.A. 10), where appeals were entertained from judgments of dismissal which the trial court had entered after it had sustained motions to suppress the evidence presented by the plaintiff and after plaintiff's counsel had advised the Court that he had no additional evidence to present.

Under the facts of this case, the circumstance that, at one point the Government took the position that the dismissal of the action should be without prejudice (R. 198), does not transform this judgment into a voluntary non-suit. The last sentence of Rule 41 (b) of the Federal Rules of Civil Procedure dealing with involuntary dismissals, (*supra*, p. 4) clearly recognizes that there may be an involuntary dismissal without a motion by the defendant, and that an involuntary dismissal may nevertheless be without prejudice.

Appellees rely on *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296, 297, (C.A. 4) which holds that, where a plaintiff voluntarily took a non-suit after an adverse ruling on a motion to remand, the dismissal was voluntarily invited, and therefore not appealable, although the court recognized that, if the plaintiff had failed to produce evidence and allowed a judgment of dismissal with prejudice to be entered against him, the judgment could have been appealed. That decision, however, is not controlling here. In that case, the intermediate ruling which the plaintiff

sought to have reviewed—the refusal to remand—in no way barred the plaintiff from offering such proof as it had available. A non-suit meant that, irrespective of the ultimate holding on review, or even without waiting for a ruling on review, the plaintiff could institute a new suit on the very same evidence which it could have produced at the trial which was non-suited. The court held the plaintiff to the choice of either resting on his challenge to jurisdiction, or presenting the evidence which he had.

Such is not the situation here. In this case, unless the ruling of the District Court is reversed, the Government can bring a new suit against these defendants only if it obtains evidence other than the subpoenaed documents which the trial court excluded. The Government cannot, as could the plaintiff in the *Kelly* case, start a new trial on the same evidence irrespective of the ultimate disposition of the case on review. The court apparently dismissed the action without prejudice because Government counsel stated that “conceivably” evidence might be obtained “after an investigation coextensive in time and labor with that heretofore undertaken”. What such a coextensive investigation would mean, in time and labor, is indicated by the facts set forth below.⁵ The more thorough

⁵ Investigation of the question of defendants' violations of the antitrust laws began in 1942 and ended with the return of the criminal indictment in November, 1946. In the course of the investigation four members of the staff of the Antitrust

the culling of the incriminating evidence in the grand jury proceedings which climaxed the prior investigation, the lesser the likelihood of obtaining adequate other evidence in a new investigation. Furthermore, if the district court's present rulings have as broad a scope as that ascribed to them by appellees, the new investigation would have to be by lawyers not contaminated with knowledge obtained through participation in the grand jury proceedings, in other words, by lawyers not familiar with the case.

The Government, instead of following this hard and dubious course, elected to prosecute the pending case to its end. This is the reverse of consenting to dismissal of its suit. We submit, therefore, that the "reality" amounts to prosecution, not "non-prosecution".

The purpose of a voluntary non-suit is to enable the plaintiff to institute a new suit on the same cause of action. Here what the Government sought was, not opportunity to begin a new suit, but entry of a judgment disposing of the case so that it might by appellate review obtain a ruling which would enable it to prove the case which it had alleged on the evidence which it had available at the time. The fact that, by granting a judgment of dismissal without prejudice, the district court,

Division examined the defendants' books and records from time to time during a seven-months' period, and Government lawyers participated in the grand jury investigation during a period of over six months. See affidavit of Chalmers Hamill, (R. 42-46).

believing its rulings on evidence to be correct, decided not to grant complete immunity to the appellees for their illegal acts in the event that the Government should discover other evidence, certainly does not establish that the Government consented to the dismissal of an action which it could have proved immediately if the Court had not improperly excluded the evidence then available.

- o The dismissal of the action was not invited by the Government; it was the inevitable result of the trial judge's ruling excluding substantially all of the Government's evidence. That was not error invited by the Government.

II

SINCE THE ONLY ORDER IN THE CRIMINAL PROCEEDINGS WHICH PURPORTS TO AFFECT THE RIGHT OF THE GOVERNMENT TO USE THE SUBPOENAED DOCUMENTS IN THE CIVIL SUIT IS NOT A FINAL ORDER, THERE IS NO ISSUE OF RES JUDICATA.

Appellees make one other contention designed to prevent consideration by this Court of the merits of the district court's ruling refusing discovery of the documents subpoenaed before the grand jury, and quashing the subpoenas in the civil action for the production of such documents. They argue that the appeal in this case seeks merely to review orders in the criminal proceedings from which the Government could have, but did not appeal, and that, irrespective of their merits, such orders are *res judicata* on the issues presented by this appeal.

The appeal, however, brings up for review orders made in the civil case pertaining to evidence pertinent to that case, and is not, therefore, an appeal from orders in the criminal proceedings. As to the question of *res judicata*, it is the Government's position that only the order of preclusion has any possible bearing on the issues in the civil suit, and that even if the doctrine of *res judicata* were otherwise applicable, such order cannot be *res judicata* here because it is not final.

A. The Orders Entered in the Indictment Proceeding Did Not Preclude the Government from Using the Subpoenaed Documents in the Civil Suit

1. Appellees contend that the Government is precluded from challenging the validity of the trial judge's rulings excluding evidence in the civil suit because it did not appeal from the order dismissing the indictment. However, it is not necessary for the Government to take the position that the dismissal of the indictment was erroneous. It is the Government's position that, even though the indictment was properly dismissed because of a defect in the composition of the grand jury, the documents produced before that grand jury did not become immune from further inspection and from further production pursuant to valid judicial process before a valid judicial tribunal. The order releasing the documents from the impounding

order was ancillary to the order dismissing the indictment. Since it merely directed the return of the original documents to the appellees, there was no reason for the Government to appeal from such order.

2. The motion for the surrender of the photostats was brought in the form of a separate proceeding after the information had been filed, but the District Court directed that the order granting such motion and the motion papers be filed in the indictment proceeding since, under his reasoning, the order for surrender of the photostats was a necessary consequence of the dismissal of the indictments.

Whether or not such order could be deemed a final order in an independent proceeding and therefore appealable, there was no reason for the Government to appeal from that order. It merely directed the return of the photostats and did not in terms preclude the use of such documents in evidence in some other proceeding. As this Court recognized in *Zap v. United States*, 328 U. S. 624, 629, an order for return of evidence is not necessarily an order of preclusion. See *In re Sana Laboratories, Inc.*, 115 F. 2d 717, 718 (C.A. 3) certiorari denied 312 U. S. 688, where the court, holding that there had been an improper seizure after a valid inspection, ordered the return of the seized documents but refused to order the suppression of the information obtained as a result of the inspection.

True, the opinion of the court on the motion for return of the photostats was based on reasoning which, if valid, would have supported an order of preclusion. The order itself, however, did not go that far. Had the Government sought to take an appeal, it would undoubtedly have been met with the argument that the order did not prevent the Government from obtaining the documents by valid process. The question in which the Government was interested, its right subsequently to use those documents, was academic in relation to the particular order entered in the indictment proceedings. Certainly the Government was under no duty to endeavor to take an appeal of doubtful propriety from an order which did not prejudice it merely because the District Court, in its opinion, used language which gave forewarning that it would rule adversely to the Government when the issue was directly involved.

B. The Order of Preclusion in the Information Proceeding is not a Final Order and, Therefore, Not Res Judicata on the Issues Presented by this Appeal

The only order in the criminal proceedings which by its terms has any bearing on the Government's right to obtain the documents as evidence in the civil suit is the order of April 20, 1948 (R. 95-96), entered in the information proceeding, to the effect that the court's opinion of February 6,

1948 (R. 81-85), was controlling as to that portion of appellees' motion which sought to preclude the use for any purpose of knowledge obtained from the documents produced before the grand jury pursuant to subpoena.

However, it is clear from the statements made by the District Judge that he did not intend that order to have any conclusive effect in the civil case (R. 117, 119, 120), and indeed declared (R. 126): "I don't see how this is going to prejudice you in some other case, and this Court is concerned only with 6070 at this time, as I understand it." Moreover, it is highly doubtful whether Rule 41(e) of the Federal Rules of Criminal Procedure may properly be construed so as to authorize an order that would have binding effect in a subsequent civil suit of this character; for the notes of the Advisory Committee point out that Rule 41(e) was not intended to go beyond existing law on this issue, and no such result was generally accepted prior to the adoption of Rule 41(e).

Were the order of April 20, 1948, a final order, there would thus be presented the question as to whether the order was ever intended to be conclusive in this civil case, and there would also be raised the interesting problem of the extent to which an order in a criminal proceeding, from which the Government has no right to appeal, can, even if clearly erroneous, forever bar the Government from using such evidence in another action.

particularly in a civil case such as the one at bar. But these issues need not be reached here, for the order of preclusion is clearly not a final order. It is an order on a motion made specifically with relation to the information theretofore filed as part of a motion to dismiss or expunge portions of that information. It is an order on a motion made by the parties named as defendants in the information. It is, therefore, an order made in the information proceeding which has not yet been terminated by conviction or dismissal. Had the order been adverse to appellees, they would have had no right of appeal therefrom. — *Cogen v. U. S.*, 278 U. S. 221, 227. And even though the order granting the motion is in practical effect more final as to the Government than an order denying the motion would be as to appellees, it is, nevertheless, an intermediate order from which the Government has no right of appeal, irrespective of the question of the Government's right of appeal in a criminal case. *United States v. Rosenwasser*, 145 F. (2d) 1015, (C.A. 9).

Since, therefore, the order of preclusion is not a final order, it cannot operate as *res judicata*. It is well established that only final orders may be relied upon as *res judicata*. *Merriam v. Saatfield*, 241 U. S. 22, 28; *Smith v. McCool*, 16 Wall 560, 561; *Reed v. Proprietors of Locks and Canals*, 8 How. 274, 291. See also *United States v. Davis*, 3 F. Supp. 97, 98 (S.D.N.Y.), in which the court held that

an order denying a motion to suppress, entered in a criminal proceeding which had resulted in a mistrial, was not *res judicata* on a subsequent motion to suppress, since the earlier order lacked finality. The fact that Rule 41(e) of the Federal Rules of Criminal Procedure may authorize an order having scope beyond the particular proceeding in which it is entered "does not confer finality upon an order entered in a proceeding which has not yet been terminated. So long as the proceeding is pending, there is always the possibility that the district judge will see the error of his reasoning and vacate the erroneous order. See *Cogen v. United States*, 278 U. S. 221, 224, where this Court recognized that an order denying a motion to preclude was subject to change. The order cannot have binding effect in another action until it acquires finality.

III

THE PRODUCTION OF DOCUMENTS BEFORE A DEFECTIVELY IMPANELED GRAND JURY PURSUANT TO SUBPOENAS WHICH WERE REASONABLE IN SCOPE WAS NOT AN INVASION OF APPELLEES' RIGHTS UNDER THE FOURTH AMENDMENT, AND THE EVIDENCE SO PRODUCED SHOULD NOT HAVE BEEN SUPPRESSED

On the merits, this case presents the question whether the fact that documents have once been

⁶ As pointed out above, however, it is at least arguable whether Rule 41(e) goes so far as to authorize such an order that would have binding effect in a subsequent civil proceeding of this character. Certainly, it is clear from statements made by the District Judge (R: 117, 119, 120, 126) that he did not intend his order of preclusion, entered in the information proceedings, to have conclusive effect in the civil case.

produced before a grand jury, subsequently found to have been defectively constituted precludes the Government from thereafter using information obtained from such documents in order to have the documents produced before a valid judicial tribunal pursuant to valid judicial process. The District Court held that the documents in effect acquired immunity because their production in the first instance pursuant to subpoena constituted a search and seizure, and that, when the grand jury was found to be invalid, such search and seizure became unreasonable with the result that neither the documents themselves nor the information obtained therefrom could be utilized by the Government.

A. The Defect in the Composition of the Grand Jury Did Not Render the Grand Jury a Wholly Illegal Body and Therefore Did Not Render the Subpoenas Illegal.

Perhaps the simplest answer to the reasoning by which the District Court reached the conclusion that the evidence produced before the Grand Jury pursuant to subpoena had to be suppressed is that the invalidity in the composition of the grand jury did not render the subpoenas illegal. The grand jury had more than *de facto* existence, and its proceedings had legal validity. Even indictments returned by that grand jury were at most voidable, but not void. If a defendant indicted by that grand

jury failed to move to dismiss the indictment before trial he could not, after conviction, successfully move in arrest of judgment on the ground that he had not been prosecuted by indictment as required by the Constitution. *United States v. Gale*, 109 U. S. 65, 71. He could not, after sentence, have secured his release on habeas corpus on the ground that the indictment would not support the jurisdiction of the court which tried him. *Kaizo v. Henry*, 211 U. S. 146; *Redmon v. Squier*, 162 F. (2d) 195, 196 (C.A. 9); *Kelly v. Squier*, 166 F. (2d) 731 (C.A. 9), certiorari denied 334 U. S. 849; See also *King v. United States*, 165 F. (2d) 408 (C.A. 8), certiorari denied, 334 U. S. 848. As this Court said in *United States v. Gale*, *supra*, at p. 71:

There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void; as where the jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select them; or where they have not been sworn; or where some other fundamental requisite has not been complied with. But there is no complaint of this kind in the present case; the complaint simply relates to the action of the court in excluding particular persons who might properly have served on the jury. We do not think that this vitiated all the proceedings so as to render them absolutely null

and void. It might have sufficed to quash the indictment if the objection had been timely and properly made. Nothing more.

Since, therefore, the defect in the composition of the grand jury does not render an indictment returned by that grand jury void, such defect cannot invalidate process issued not by the grand jury, but by the court. The grand jury obviously had sufficient legal validity to have authority to examine documents. Hence, the court could properly order documents produced before the grand jury, and the Government prosecuting officers could properly examine those documents. A witness called before the grand jury has no standing to challenge its composition so long as the grand jury has *de facto* existence, *Blair v. United States*, 250 U.S. 273, 282. Contempt in refusing to appear pursuant to a subpoena for production of records before a *de facto* grand jury would not be excused because of any such defect as that here involved (see *Blair v. United States, supra*), any more than willful failure to appear pursuant to subpoena to testify on the trial of an action would be excused on the ground that the court lacked jurisdiction of the cause. See *Fairfield v. United States*, 146 Fed. 508 (C.A. 8) holding that the failure of a complaint to state a cause of action did not constitute a defense to willful disobedience of a subpoena. The *Blair* case implicitly recognizes that a defect in the composition of the grand jury

which does not destroy its legal validity does not invalidate process for appearance before that body, for if it did, the invalidity of the process would be a defense to non-appearance.

The subpoenas by which the documents involved in this case were produced before the grand jury were, therefore, valid legal process, and the production of documents pursuant thereto, if it was a search, was a valid search. Indeed, under the rule of the *Blair* case, the very documents here involved were properly before the grand jury, and a refusal to produce them in accordance with the subpoenas would have been the basis for valid contempt proceedings. The compulsory production of these documents before the grand jury in no sense constituted an illegal search. The District Court therefore erred in denying the Government's motion for discovery and in quashing the subpoenas in the civil suit on the ground that the "search" pursuant to subpoena was an illegal search.

B. The Production of Documents Which the Government Had a Right to See Pursuant to Subpoena Reasonable in Scope Was Not a Search Within the Meaning of the Fourth Amendment

Actually, the production of the documents before the grand jury pursuant to subpoenas which, as the District Court found, were reasonable in scope and which called for documents which the Government was entitled to have produced, was not a

search and seizure within the meaning of the Fourth Amendment. The District Court is mistaken in its basic premise that the mere production of documents pursuant to subpoena is in itself a search and seizure. The District Court has misread such decisions of this Court as *Boyd v. United States*, 116 U.S. 616; *Hale v. Henkel*, 201 U.S. 43, 76-77; *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 305-306, and has failed to recognize the distinction between an actual and constructive search. The decision below is another example of the situation which this Court found in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 202, when it said that "the primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure."

In the case of a true search, where premises are entered and a search made, the act of entering to search is in itself a breach of privacy and therefore from its commencement a matter within the scope of the Fourth Amendment. Whatever the nature of the articles sought, even if they be property belonging to the Government itself, the intrusion into the privacy of the home or other premises must have legal sanction. Such sanction is given when the search is authorized by a valid warrant or by those special conditions which the law

recognizes as justifying search or seizure without a warrant. The fact that the documents sought are those which the Government has a right to seize is immaterial if the original intrusion of privacy is illegally made, for it is the right of privacy which the Fourth Amendment is designed to protect. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392.

No right of privacy, no castle wall, is breached by an order of a court directing a person to produce specified records before a judicial tribunal. When documents are subpoenaed, there is in actuality neither a search nor a seizure. But, since the primary purpose of the Fourth Amendment is to protect the right of privacy, the cases referred to above have said, expressly or implicitly, that where process goes beyond the point of reasonableness, there is, in effect, an invasion of privacy, and thus a violation of the Fourth Amendment. The important point in all these decisions, however, is that this Court has spoken in terms of the Fourth Amendment only to the extent to which the process is unreasonable, i.e. to the extent that it seeks to obtain information which the Government has no right to secure, or to the extent that the subpoena is so broad as to constitute a fishing expedition without direction. The right of privacy is not reached at all unless the subpoena goes beyond the bounds of proper governmental action.

The fountainhead of the doctrine of constructive search is the case of *Boyd v. United States*, 116 U.S. 616, and that very case makes clear one of the limitations of the doctrine. The *Boyd* case was concerned with a Statute which declared that in an action for forfeiture (interpreted by the Court as a criminal case), the United States could demand the production of records which would tend to support the allegations of the complaint, and that, if a defendant should refuse to produce such records, the allegations made by the Government should be taken as confessed. The Court held that to make non-production of records a confession of facts was the equivalent of compelling the production of testimony, and therefore a violation of the privilege against self-incrimination guaranteed by the Fifth Amendment. It also held (p. 622) that:

... a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

Throughout the opinion, however, the emphasis is on the fact that the evidence sought to be compelled consisted of "private papers", i.e. papers which the Government had no right to procure

under any other available form of judicial process. It was the nature of the papers sought, and not the mere fact of compulsory production, which brought the compulsory production of such papers within the scope of the Fourth Amendment.

That consideration is made even clearer by the subsequent case of *Wheeler v. United States*, 226 U.S. 478, 489-490, where this Court upheld the validity of a subpoena for the production of the books of a defunct corporation which were held by one of the former stockholders. In that case, this Court emphasized that the subpoenaed papers were not private documents and held that it was the character of the documents, and not the nature of the custody in which they were held, that determined the propriety of their compulsory production in the light of the Fourth Amendment. The case points up the distinction between a true and a constructive search, for, if the mere fact of compulsory production of papers were in itself a search, then the individual rights of the individual holding such papers would have been the major consideration. Certainly, an entry into the home of the stockholder to get the corporate papers from his possession without a warrant would have been a violation of the Fourth Amendment even though the papers themselves were not privileged. In the case of a constructive search, therefore, it is not the fact of production, but the nature of the

documents to be produced, which determines the applicability of the Fourth Amendment.

The other line of cases dealing with the Fourth Amendment in relation to judicial process has held that process violates the Amendment when its demands are so sweeping that they can be characterized as a fishing expedition, embarked upon without direction, on the mere possibility that examination may uncover evidence of crime. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-306; *Hale v. Henkel*, 201 U. S. 43, 76-77. Here, again, the violation of the Fourth Amendment has not been found to lie in the mere fact that books and papers must be produced. A search occurs only if the demands of the process go beyond the point of reasonableness. It necessarily follows that where a subpoena is reasonable, i.e., where it is specific and calls for the production of documents which the Government has a right to see, the Fourth Amendment never comes into play. As this Court said in *Wilson v. United States*, 221 U. S. 361, 376:

there is no unreasonable search and seizure, when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced. * * *

It would probably be more accurate to say that in such situations there is no search and seizure at all. See *United States v. Bausch & Lomb*, 321 U. S. 707, 727.

This Court summed up the whole problem of the relation of the Fourth Amendment to the compulsory production of corporate records in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208, as follows:

the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

Production of documents pursuant to reasonable subpoenas issued on behalf of the defectively constituted grand jury did not, therefore, invade appellees' rights under the Fourth Amendment. The significant facts with respect to the relation of subpoenas to the Fourth Amendment are only whether the documents were the kind of records whose production could be compelled and whether the process compelling that production was sufficiently definite. In the present case, it was judicially determined that the subpoenas for the production of records before the grand jury were reasonable, that they

were specific, and that they called for documents which the Government had a right to have produced. Hence, the issuance of the subpoenas and the production of the documents pursuant thereto did not violate the appellees' rights of privacy. The subpoenas never reached the area protected by the Fourth Amendment.

C. The Reasons Underlying the Rule Requiring the Suppression of Evidence Have No Application to the Circumstances of This Case

Even assuming that the production of documents pursuant to subpoena before a defectively constituted grand jury could be deemed a violation of the Fourth Amendment, the District Court erred in holding that the government should, for that reason, be precluded from using information obtained from such documents. This is not a case which would justify the application of the rule of *Weeks v. United States*, 232 U. S. 383, and *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, requiring the suppression for all purposes of evidence seized by Government officers in violation of the Fourth Amendment. As those cases make clear, the rule of suppression is based on the theory that suppression of evidence is the only effective sanction against wrongful invasion of privacy by Government officers, and that, as between a defendant whose rights have been unlawfully invaded and the Government which has done the wrongful invading,

the Government should not be allowed to profit by its own wrong. The doctrine is an exception to the usual common law rule holding that relevant evidence will not be excluded. *Olmstead v. United States*, 277 U. S. 438, 467-468. It has not been extended beyond the point of requiring the wrongdoer to pay for his own wrong. Thus in *Burdeau v. McDowell*, 256 U.S. 465, this Court held that the Government was not required to return evidence received from a private party who had obtained the documents by theft or trespass since the Government had no part in the illegal action. Cf. *Feldman v. United States*, 322 U. S. 487, 492.

Neither of the basic reasons underlying the *Weeks* rule exists in this case. Prosecuting officers of the United States had no part in the only element of wrongfulness found by the District Court, the improper impanelling of the grand jury. The composition of the panel from which the grand jury was drawn was determined by the District Court or officials appointed by the District Court. While the prosecuting officers participated in obtaining subpoenas calling for production of documents before the grand jury, they were not charged with responsibility for the grand jury's improper constitution. It had been summoned by the court and had at least *de facto* existence. In these circumstances, Government prosecuting officers cannot be held to the duty of deciding for themselves that the grand jury has been improperly constituted and

has no power to investigate crime in that district. Cf. *Blair v. United States*, 250 U. S. 273, 282, where this Court held that a witness summoned to appear before a grand jury could not challenge the validity of its existence. The Government was under a duty to take the grand jury as the court had constituted it, and to produce before that grand jury such evidence as it could obtain by issuance of subpoenas proper in themselves.

Furthermore, the appellees have already been granted redress for the one element of wrongfulness which the District Court found, the technical defect in the manner of impanelling the grand jury. That remedy, dismissal of the indictment, is in itself an extraordinary remedy, not based upon constitutional grounds, but granted by this Court as a means of exercising its supervisory power over the administration of justice in the lower federal courts, without the necessity of a showing by defendants that they are members of the excluded class or that they have been prejudiced by the defective composition of the grand jury. *Ballard v. United States*, 329 U.S. 187, 192-193. The extraordinary nature of this remedy is particularly apparent when it is considered in relation to the facts of this case. Appellees—large corporations and male officers thereof—were able to obtain the dismissal of an indictment which charged a violation of federal statutes relating to restraints on interstate commerce, a charge based almost ex-

clusively on documentary evidence obtained from appellees themselves pursuant to valid subpoenas. Appellees were not members of the excluded class and could show no prejudice from the exclusion of women. No constitutional rights were involved, the eligibility of women being a matter of state law which was made applicable by federal statute, and not of constitutional right. The exclusion of women was not the result of a deliberate disregard of the state law by the federal district court, but was the result of an ambiguity in the condition imposed by the state statute in requiring a prior finding by a jury commissioner that the accommodations for women were adequate. There was in this case no finding by any jury commissioner on the adequacy of the facilities for women in the federal courthouse and, in ruling on this case, the judge himself expressed doubts as to the adequacy of the available facilities (R. 69). The district judge was not certain of the correctness of his ultimate ruling dismissing the indictment (R. 69). The Government did not appeal that ruling, and we are not here questioning its validity. We do point out, however, that, under all these circumstances, the remedy of dismissal of the indictment was more than adequate to compensate appellees for any possible wrong to them resulting from the failure to include women in the panel of grand jurors, and that appellees have obtained a very

substantial remedy for a very technical defect in the composition of the grand jury.

For this technical defect resulting from, at most, the misconstruction of a state statute by a federal district court, in impanelling the grand jury, appellees will, if the instant judgment of the district court be upheld, obtain, in addition to the extraordinary remedy they have already been granted, the far greater remedies which this Court has hitherto granted only to defendants whose constitutional rights of privacy have been wrongfully invaded. For a technical defect in the composition of the grand jury which did not prejudice appellees, and which was not attributable in any way to fault on the part of Government officers, all documents produced before the grand jury and all information obtained from such documents have been declared immune from further use by the Government, not only in a criminal proceeding, but in a civil suit as well. A technical defect in the composition of the grand jury, resulting from a permissible construction of an ambiguous state statute by a federal district court, thus becomes a means of granting immunity to law violators, not only from criminal responsibility but also from their liability to the Government under civil law. Such a result, we submit, is a travesty of justice which is required neither by reason nor authority.

CONCLUSION

We respectfully submit that this Court has jurisdiction of this appeal, and that the judgment below should be reversed with directions to the District Court to grant the Government's motion for discovery under Rule 34 and to permit the Government to issue subpoenas for the production of the documents produced before the grand jury.

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MARCH, 1949.

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SUPREME COURT, U. S.

No. 416

District Court of the United States

DISTRICT OF RHODE ISLAND

416

UNITED STATES OF AMERICA,

Plaintiff (Appellant),

v.

WALLACE & TIERNAN COMPANY, INC., *et al.*,

Defendants (Appellees).

CIVIL ACTION

NO. 705

**STATEMENT MAKING AGAINST JURISDICTION OF
THE SUPREME COURT OF THE UNITED STATES,**

AND

**MOTION BY DEFENDANTS (APPELLEES) TO DISMISS
ATTEMPTED APPEAL**

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(5) Likewise, the decree of February 18, 1948, directing delivery to the defendants of the photostatic copies made by the Department of Justice of some of their subpoenaed and impounded documents, was final in law; and the plaintiff also gave it finality in fact by complying therewith and by not appealing therefrom

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(6) Furthermore, the decree of April 20, 1948, in Criminal Action 6070 (instituted by Information after the dismissal of the Indictment), suppressing any evidence obtained from the documents ordered by the aforesaid decrees to be delivered to the defendants, is given finality by Rule 41(c) of the Rules of Criminal Procedure for the District Courts of the United States

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District Court of the United States

DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA,

Plaintiff (Appellant),

v.

WALLACE & TIERNAN COMPANY, INC., *et al.,*

Defendants (Appellees).

CIVIL ACTION

NO. 705

STATEMENT MAKING AGAINST JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES,

AND

MOTION BY DEFENDANTS (APPELLEES) TO DISMISS ATTEMPTED APPEAL

Pursuant to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the appellees:

1. File this Statement of Matters and Grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant;

2. Move to dismiss the attempted appeal.

In support of the foregoing the appellees submit the following:

Matters and Grounds

In an action of this kind, a direct appeal to the Supreme Court of the United States lies only from a final decree which is involuntary or uninvited on the part of the appellant.*

* The words "appellant" and "plaintiff" are used interchangeably hereafter. References to pages of the transcript of hearings in the District Court use the page numbers of the official reporter's record on the dates specified.

A United States District Court has inherent judicial power to dismiss, without prejudice, an action for non-prosecution. Rule 41 of the Rules of Civil Procedure does not limit this power. (*Carnegie Nat. Bank v. City of Wolf Point*, 110 Fed. (2) 569, 572.)

In the present instance, after the District Court had on August 6, 1948, rendered its "opinion" that the complaint herein should be dismissed "without prejudice", the plaintiff served on August 27, 1948, a notice reading:

"Please take notice that the attached Judgment will be submitted to the Court at 11.30 o'clock on Sept. 3, 1948."

On September 3, 1948, a "Judgment" in the precise form thus sponsored and proposed by the plaintiff-appellant here, was entered. It read as follows:

"The above entitled case came on for trial on June 2, 1948 and, pursuant to the Court's opinion dated August 6, 1948, it is ORDERED, ADJUDGED, AND DECREED:

"That the Government's 'request' for judgment and relief prayed for in the complaint is denied and the action is dismissed without prejudice."

Thus, the Judgment of September 3, 1948, as thus sponsored for settlement by the appellant itself, incorporated and effectuated the "Court's Opinion dated August 6, 1948," in which opinion the Court had found as a fact and determined that (p. 21):

"The reality here practically amounts to *non-prosecution* since the Government states that other evidence than the suppressed documentary evidence 'might be obtained' to establish violations of the Sherman Act." (Italics ours.)

Furthermore, the Judgment of September 3, 1948, as thus sponsored for settlement by the appellant itself, judicially and definitively declared and determined that the

judicial action on August 6, 1948, was the delivery of an "Opinion" and not the "Judgment." Also it superseded what had gone before.

Nevertheless, the appellant's papers on this attempted appeal, dated October 4, 1948, recite the attempted appeal as being taken, not from this "Judgment" entered on September 3, 1948, upon the plaintiff's own application and in the precise form proposed by it, but from what that very Judgment describes as, and determines to be, "the Court's Opinion dated August 6, 1948."

The appellees accordingly assert lack of jurisdiction and appealability for each of the following reasons:

(1) There can be, in an action under the Sherman Law, but one "final decree" from which appeal may be taken direct to the Supreme Court of the United States; and neither an opinion nor even an order for judgment is such "final decree"—particularly where a formal "Judgment" is thereafter proposed by the party intending an appeal and is entered by the Court. (§29, Title 15, U. S. C. A.) (See Footnote.):

FOOTNOTE: As already stated, on August 27, 1948, the plaintiff served this Notice: "Please take notice that the attached Judgment will be submitted to the Court at 11.30 o'clock on Sept. 3, 1948." The phrasing and form of Judgment attached to this Notice were precisely the phrasing and form of the Judgment as entered by the Court on September 3, 1948. Thus, both the plaintiff and the District Court recognized the propriety and need of a formal Judgment to implement and effectuate the "Opinion dated August 6, 1948," and both also have recognized and created the Judgment of September 3, 1948, as the Final Judgment.

Whether or not the judicial event on August 6, 1948, standing alone, could have been interpreted as a judgment, the inescapable fact is that a month later the plaintiff and the Court declared and determined it to be the delivery of an "Opinion" and effectuated and superseded it by the "Judgment" of September 3, 1948. Hence, an attempted appeal, taken solely from the judicial event of August 6, 1948, is not "from the final decree of the District Court" (§29 of Title 15, U. S. C. A.). It confers no jurisdiction on the Supreme Court of the United States, and should be dismissed. (*United States v. Hark*, 320 U. S. 531.)

As said in that case (p. 534):

"Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry. In recent cases we have so treated it." (Citing *U. S. v. Resnick*, 299 U. S. 207; and *U. S. v. Midstate Horticultural Co.*, 306 U. S. 161.)

Also directly in point are: *St. Louis Amusement Co. v. Paramount Film Distributing Corp.*, 158 Fed. (2) 30, 31 (C. C. A. 8); *Judson v. Gage*, 98 Fed. 540, 543 (C. C. A. 2); *G. Amsinck & Co. v. Springfield Grocer Co.*, 7 Fed. (2) 855, 858 (C. C. A. 8); *McGhee v. Leitner*, 41 Fed. Sup. 674, 676.]

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(2) that, on this record, this finding of fact and determination by the District Court that "the reality here practically amounts to non-prosecution," were sustained by sufficient evidence;

(3) that this record shows that the Judgment in its present form and wording was not only proposed but invited and maneuvered for by the appellant and hence is not appealable by it in any event; and

(4) that the United States Supreme Court is without jurisdiction to entertain the attempted appeal.

I

The Findings and Determination by the District Court

The evidence on which the Court based its findings of "non-prosecution" is set forth in much detail in the Court's opinion of twenty-two pages, filed August 6, 1948, and incorporated in the judgment of September 3, 1948, in accordance with the form of judgment proposed by the appellant.

These findings of fact were (Opinion, p. 21):

"I find that the plaintiff has not produced any facts or evidence in support of the complaint.

After the Government completed the presentation of its evidence the defendants did not move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

The reality here practically amounts to non-prosecution since the Government states that other evidence than the suppressed documentary evidence 'might be obtained' to establish violations of the Sherman Act."

As to the law, the District Court held that a court of equity has inherent power "to dismiss a cause for failure or want of diligence in prosecution"; and that if a plaintiff "declines or fails to offer evidence, the court may, in its discretion, dismiss his action without prejudice". The Court cited:

Carnegie Nat. Bank v. City of Wolf-Point, 110

F. (2d) 569, 572;

Hicks v. Bekins Moving & Storage Co., 115 F. (2d)

496;

Rudolph v. Sensener, 39 App. D. C., 385, 388.

II

The Evidence Showing Non-prosecution and an Invited Dismissal

(1) When the case was called on the trial calendar on June 2, 1948, Mr. Tuttle, counsel for the defense, demanded to know whether the plaintiff was intending to conduct a trial "in the usual sense of the word," contrary to its past assurances that it did not so intend. Mr. Tuttle stated that otherwise, the defendants would want several months for preparation (Tr. 3-5). The plaintiff's past assurances were thereupon quoted by Mr. Tuttle (Tr. 3). Briefly, they were these:

At the court hearing on May 24, 1948, in discussing the plaintiff's attitude if the case were called up for trial, its counsel said (Tr. 11):

"Mr. Kelleher: I wish to assure counsel and the Court that in view of the rulings of the Court announced today, *the Government does not intend to offer evidence if a date (for trial) is granted as we have requested.*" (Italics ours.)

Accordingly, when, at the opening of the so-called "trial" on June 2, 1948, the defense counsel quoted the foregoing assurances on May 24, 1948, by the plaintiff's counsel, the latter said that he was not asking for and would not conduct a trial "in the usual sense of the word". To quote (Tr. 4):

"Mr. Kelleher: I wish to state now that in accordance with Mr. Tuttle's statement that there would be no trial 'in the usual sense of the word,' which is the precise language which he used throughout his statement, that that is correct."

The plaintiff's counsel then followed this assurance with the further assurance to the defense that it need do nothing at all in connection with the proceedings which the plaintiff was about to take and that the defendants would not be prejudiced thereby. To quote the plaintiff's counsel (Tr. 4):

"Mr. Kelleher: I think it will become clear as we proceed this afternoon that the defendants will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time."

In accepting this assurance, the plaintiff's counsel further said (Tr. 5):

"Mr. Kelleher: I can assure counsel they are perfectly prepared for what we are going to do this afternoon and if anything comes up and you wish a continuance; we will consent to it. I am perfectly certain you will not need it and will not request it."

There then ensued the following statements by defense counsel and by the Court (Tr. 6):

"Mr. Tuttle: Yes, Your Honor. I am relying on the fact that Your Honor has in mind that we received

at the past hearing certain assurances and that we are here on the basis of those assurances and nothing else.

The Court: Very well, you may proceed, gentlemen, *with that understanding.*" (Italics ours.)

(2) In the so-called "trial" which then ensued, on the basis of these assurances by plaintiff's counsel, he said he would "like to file with the Court an affidavit" (Tr. 21) which he was "not treating as evidence being given under oath" (Tr. 22), but which "assumes as the background the record thus far made in this court" (Tr. 22). Defense counsel objected to the filing or receipt of the affidavit for any purpose (Tr. 23-6); but the Court said (Tr. 28):

"However, I am going to allow the affidavit to be filed because, in the opinion of the Court, it is nothing more than a statement by the Government why it is unable to proceed with the case further today. The affidavit may be filed."

The affidavit thus filed was by Mr. Kelleher himself. We quote from it as follows (Court's opinion of August 6, 1948, pp. 12-13):

"Affiant further avers that the subpoenaed documents constitute substantially all of the Government's evidence in this case. Although the Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. Most of such additional evidence would depend for its admissibility upon its connection with the defendants through other evidence;

such connection can only be established through certain of the subpoenaed documents and the Government therefore cannot offer the additional evidence *de bene* unless it is permitted also to offer the subpoenaed documents. The rest of the additional evidence is so incomplete and piecemeal as to be, virtually meaningless without the subpoenaed documents as a setting for such evidence. In other words, the additional evidence either depends upon the subpoenaed documents for its own admissibility or is unintelligible without them. Furthermore, the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint and *although conceivably such evidence might be obtained, that could only be done after an investigation coextensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents.*" (Italics ours.)

It was to these italicized words that the District Court alluded as aforesaid in its opinion of August 6, 1948, when it found (p. 21) that: "The reality here practically amounts to non-prosecution," since the Government conceded that other evidence "might be obtained" but that it preferred to leave the case "in its present posture".

The only other step taken by the plaintiff's counsel at this so-called "trial" was the rather farcical one of calling his associate counsel, Mr. Alfred Karsted, as a "witness" (Tr. 14), and asking him whether, in the course of his participation in the investigation by the "Special Grand Jury" (which the plaintiff now concedes to have been rightly held by the Court an illegal and unconstitutional body), he had examined certain documents which the plaintiff's counsel admitted to be among those ordered by the Court to be returned to the defendants (Tr. 15-20).

Defense counsel objected to this questioning on the grounds that it was an improper effort to elicit hearsay and secondary evidence as to the contents of written documents; that it was an improper effort to make use of information contained in documents which had been illegally and unconstitutionally seized and used by the illegal grand jury and the Department of Justice; and that the proposed testimony would be immaterial, irrelevant and incompetent (Tr. 16-20). The Court thereupon sustained the objection. Thereupon the plaintiff's counsel stated that he had "no further questions" (Tr. 20). Since there was no cross-examination, the so-called "witness" left the stand (Tr. 20).

The plaintiff's counsel then followed the foregoing illusion of a trial with the announcement that "the plaintiff rests" (Tr. 29); and defense counsel rejoined: "I cannot conceive what I am called upon to say or do" (Tr. 29).

Notwithstanding that he had not presented any evidence (least of all, proved anything), the plaintiff's counsel then achieved an "all-time high" in extraordinary and artificial applications in court, by saying (Tr. 32):

"I urge Your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint."

Plaintiff's counsel then heightened (if that were possible) the transparent insincerity of this application by refusing the Court's request for a statement of the "grounds" for so unheard-of a proposal (Tr. 32-37), and summed up his position by this invitation to the Court (Tr. 33):

"Mr. Kelleher: I am asking Your Honor to dispose of the case." (Italics ours.)

And again (Tr. 36):

"Mr. Tuttle: The prosecution has rested upon nothing. It says it has rested. There is no magic in those words. It has just done nothing in a legal sense here today.

The Court: That is the difficulty, gentlemen, you are confronting the Court with, to put it bluntly and plainly; * * *

Mr. Kelleher: *All I ask Your Honor is to rule.*"
(Italics ours.)

To this invitation (the only possible disposition being a dismissal for non-prosecution), the defense counsel and the Court rejoined as follows (Tr. 45):

"Mr. Tuttle: We are not resting the case in the sense that there is a prosecution which has been proved or as to which evidence has been presented. We are simply saying that we regard this as non-prosecution and that we are not—

The Court: To be frank with you, gentlemen, that is what it appears to the Court at the moment. Whether I am right or not in that, I don't know, but I am going to take time to find out whether or not the Court has a right to dismiss this because of the record."

Briefs were thereupon submitted and the decision expressed in the Court's aforesaid opinion of August 6, 1948, and its judgment of September 3, 1948, followed.

III

The "reality" was non-prosecution and an invited dismissal, suggested, requested, maneuvered for and even phrased by the plaintiff.

(1) The foregoing makes plain that the so-called "trial" on June 2, 1948, was not a trial at all, but rather a sort of pantomime whereby, foregoing the "time and labor" of securing the obtainable evidence free from constitutional inhibition, the plaintiff's counsel presented no evidence, filed an affidavit which he was "not treating as evidence" (Tr. 21), asked his own associate, imaginatively called a "witness", a few non-probative and utterly incompetent questions, and "rested" (Tr. 29). On the basis of this vacuum, he then said he was "asking Your Honor to dispose of the case" (Tr. 33).

True, the plaintiff's counsel wound up the rather hilarious day by stating that he was making a "summation", which he rhetorically concluded by saying (Tr. 43): "Your Honor, I request judgment for the plaintiff." Quite understandably the astonished District Court exclaimed (Tr. 33):

"The Court: I never heard of such a thing, of a Court being asked to do something that was not based upon evidence."

Thus, at the close of the so-called "trial" of June 2, 1948, the situation was solely the plaintiff's own contrivance, and was quite in keeping with the assurance of the plaintiff's counsel at the very outset that defense counsel need do nothing since they "will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time" (Tr. 5).

Accordingly, the role of the defense, as thus allotted by plaintiff's counsel himself, was solely that of spectators; and at the end defense counsel stated (Tr. 44):

“Mr. Tuttle: I have stated, Your Honor, that we interpret this situation as one where the Government—whatever terminology it chooses to use—nevertheless, is, in fact and in law, confessing non-prosecution; and that we do not, consequently, feel called upon to quarrel with the Government over that. Now we say ~~frankly that under those circumstances we do not regard ourselves as required to go on with the evidence or with anything at all for that matter.~~ * * *

(2) Nor was this purpose and plan on the part of the plaintiff to seek, invite and, if necessary, force a termination of its own case by a judgment of dismissal, any sudden decision at the so-called “trial” on June 2, 1948.

As far back as the hearing of April 20, 1948, on the plaintiff's motion for a certain postponement, the plaintiff's counsel had requested the Court to set a date for this nominal “trial”, saying (Tr. 11):

“Mr. Kelleher: * * * we are prepared to announce to the Court that the Government is unable to proceed further in the trial of the case; that the Government has no evidence of any substantial amount on the basis of which it can go ahead with the trial; *and we will, therefore, suggest to Your Honor that you enter judgment with prejudice against the Government and from that judgment we shall appeal directly to the Supreme Court of the United States.*” (Italics ours.)

And later, at the hearing of May 24, 1948, on the defendants' motions to quash certain subpoenas, the plaintiff's counsel, while still asserting that he still proposed to request the Court to enter a judgment of dismissal, modified as follows the aforesaid content of the judgment of dismissal which on April 20, 1948, he had stated he would request (Tr. 12):

"Mr. Kelleher: Since making that statement (on April 20) we have been considering whether judgment with prejudice or without prejudice should be entered, and I do not intend to concede that the judgment to be entered should be with prejudice."

Thus, as near as May 24, 1948, to the so-called "trial" of June 2, 1948, the plaintiff, through its counsel, formally announced in open Court that when the case came up for the so-called "trial" it would suggest to the Court a judgment of dismissal without prejudice—precisely the form of judgment which (as aforesaid) the plaintiff proposed for settlement by notice dated August 27, 1948, and procured to be entered on September 3, 1948.

(3) *The law is well settled that a plaintiff who requests or invites a judgment of dismissal or non-prosecution, or maneuvers for it, and, in this case, even proposes the form and phraseology of it, cannot appeal therefrom, particularly where such judgment is, at the plaintiff's own request, "without prejudice" and thus gives the plaintiff the benefit of a full opportunity to bring a new action and to support it with the competent and lawful evidence which Mr. Kelleher's aforesaid affidavit indicated could be available after "an investigation coextensive in time and labor" (Court's opinion of August 6, 1948, pp. 42, 43).*

This well settled rule is thus stated in the headnote to the decision of the Circuit Court of Appeals for the 8th Circuit in *Francisco v. Chicago & A. R. Co.*, 149 Fed. 354:

"No writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit or dismissal rendered in a national court at his request or with his consent. Such a judgment, however, rendered on the motion of the defendant and against the objection and the protest of the plaintiff is reviewable at the latter's instance."

In the course of its opinion, the Circuit Court of Appeals said (p. 355):

"But invited error is irremediable. If the court erred in the rendition of the judgment of nonsuit, it erred at the plaintiff's request and to the prejudice of the defendant, and that error can form no ground for the reversal of the judgment at the suit of the plaintiff who procured it. A judgment of nonsuit upon the motion or request of the defendant and against the objection or protest of the plaintiff is reviewable by writ of error. *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 29, 39, 40, 11 Sup. Ct. 478, 35 L. Ed. 55; *Meehan v. Valentine*, 145 U. S. 611, 614, 618, 12 Sup. Ct. 972, 36 L. Ed. 835."

Another decision which seems to fit perfectly is that of the Court of Appeals of the District of Columbia in *Rudolph v. Sensener*, 39 App. D. C. 385 (not otherwise reported). There, in a proceeding to condemn lands for an alley, the petitioning Commissioners contended at the trial that their own determination was conclusive, and they refused to produce proof showing the necessity for the proposed alley. In other words, having obtained a day in court for trial, the Commissioners refused to proceed with the presentation of evidence available to them on an issue which in law was essential to their case. Thereupon the Supreme Court of the District of Columbia entered an order reading as follows (p. 387):

"Upon consideration of the petition of the commissioners of the District of Columbia, filed herein, and of the answers filed thereto by George W. Sensener et al., and of the announcement made, in open court, by counsel for the said commissioners, that the said commissioners decline to proceed with the prosecution of this proceeding in conformity with the order of the court heretofore passed herein as to

proof of the necessity of said proposed alley, it is, by the court this the 19th day of April, A. D. 1912, ordered that the said petition of the said commissioners be, and the same, is hereby, dismissed."

From this order the Commissioners took an appeal which the respondent moved to dismiss. In granting dismissal, the Court of Appeals said (p. 388):

"Without a bill of exceptions we are confined to the recitals of the order itself in considering its nature and effect. So considered, *our conclusion is that it indicates a voluntary nonsuit by the plaintiffs.*" * * *

"*If he declines or fails to offer evidence, the court may in its discretion dismiss his action without prejudice, or enter a judgment against him. Substantially, this is what the plaintiffs in this case did. The situation is of their own creation, no matter what was the inducement thereto, and there is nothing from which they can appeal. The appeal is dismissed.*" (Italics ours.)

To the same effect are: *Erans v. Phillips*, 4 Wheaton 73 and *Central Transportation Co. v. Pullman's Car Co.*, 139 U.S. 24, 39.

IV

Moreover, the plaintiff (the appellant now) allowed certain basic orders to become final by compliance and failure to appeal, and cannot now revive by indirection or circuitry or collateral attack its expired opportunity for appealing.

Aside from the foregoing considerations which, we submit, show conclusively that the United States Supreme Court has no jurisdiction and that this attempted appeal cannot be entertained, the same result follows from the plaintiff's course in giving to certain basic determinations and decrees finality in fact and in law.

The record discloses the following main proceedings in the District Court:

(1) Subpoenas of the so-called "Special Grand Jury", compelling production by the defendants before that body of over 200,000 sheets; the impounding thereof on the plaintiff's application; and the search, examination and use of such papers by the assistants of the Attorney General and by the "Special Grand Jury." This was an autonomous proceeding, entitled "In re Grand Jury Investigation" and docketed "Misc. 5301."

(2) A subsequent purported Indictment of the defendants ("Criminal Action No. 6055") filed on November 18, 1946 by such "Special Grand Jury", but later dismissed (without appeal) as not due process and as not found by a constitutional body.

(3) A proceeding by the defendants for the return of the papers so seized, impounded and searched; and the subsequent return of them pursuant to an unappealed decree of the court.

(4) A subsequent Criminal Information (No. 6070) against the same defendants, repeating *verbatim* the

allegations and charges of the dismissed Indictment, and filed after the latter's dismissal.

(5) A subsequent independent proceeding by the defendants to recover from the Attorney General's office the photostatic copies made by it of some 7,000 of the multitudinous papers seized, impounded and searched as aforesaid; and the subsequent delivery of them to the defendants pursuant to an unappealed decree of the Court.

(6) This present civil action (No. 705) against the same defendants, the complaint wherein is mere repetition *verbatim* of the allegations and charges of the dismissed Indictment and of the Information.

These six proceedings are discussed in the following like numbered Subdivisions.

(1)

The seizure, impounding and search of the defendants' papers and property.

Defendants resisted the multitudinous demands of the aforesaid subpoenas of the "Special Grand Jury" as an oppressive abuse of process; but the Court denied their test motions to vacate.

Thereupon, the two hundred thousand papers were seized and were impounded in Providence, Rhode Island, at the instance of the Department of Justice and were searched, examined and used by it and the "Special Grand Jury." Some were put in evidence before that body. The purported "Indictment" ensued.

The determinations that the so-called "Grand Jury Investigation" and the "Indictment" were not due constitutional process, and that the "Special Grand Jury" was not a lawful, constitutional body.

On the authority of *Ballard v. United States*, 329 U. S. 187, and *Zap v. United States*, 330 U. S. 800, the defendants moved to dismiss the Indictment as filed by a body without constitutional existence since, notwithstanding the laws of the State of Rhode Island for the service of women on grand and petit juries in that State, the District Court of the United States in Rhode Island had continuously and intentionally excluded women from all its juries, including this "Special Grand Jury."

The Notice of this Motion to dismiss the "Indictment" was dated December 21, 1946, and it recited, as its grounds in law, that:

"The Special Grand Jury which returned the indictment to this Court was not selected, drawn, or summoned in accordance with law; and such indictment did not constitute due process of law."

This motion was sustained by the Court in an opinion delivered orally on March 19, 1947, on the authority of the *Ballard* and *Zap* cases. A decree accordingly was entered.

(3)

By electing not to exercise its acknowledged right of appeal, the plaintiff gave finality to the decree annulling the so-called "Grand Jury Investigation" and dismissing the "Indictment" as violative of the Fourth and Fifth Amendments.

The plaintiff's "Statement as to Jurisdiction", filed herein on October 4, 1948, states (p. 3), as to the dismissal of the Indictment, that *the plaintiff, "believing this decision correct, took no appeal from the judgment of dismissal."*

△ This concession in the appellant's present "Statement as to Jurisdiction" is not a recent conclusion on its part. As far back as April 20, 1948, its counsel had stated, during a hearing in court (Tr. 30):

"Mr. Kelleher: I have explained the reason we didn't appeal (from the dismissal of the Indictment).
* * * I have explained that, that the Government felt Your Honor was right."

The plaintiff could have appealed direct to the Supreme Court of the United States, if it had so desired.

U. S. C. A., Title 18, §682;

U. S. C. A., Title 15, §29;

Rule 12 of the Federal Rules of Criminal Procedure.

In consequence, the determinations of law and fact implicit in the decree annulling the so-called "Grand Jury Investigation" and dismissing the "Indictment" as violative of the Fourth and Fifth Amendments have at all times since been final, undisputed and *res adjudicata* between the same parties in all proceedings and actions.

(4)

The decret of March 19, 1947, directing the return of the seized, impounded and searched documents (property of the defendants) was final in law; and the plaintiff also gave it finality in fact by complying therewith and by not appealing therefrom.

(a) The law is well settled that grand jury subpoenas *duces tecum* constitute compulsory production and seizure, followed by search, of property and papers; and that, if such production, seizure and resultant search are by or for a purported grand jury having no status in law, or by representatives of the Department of Justice in aid of such illegal body, the Fourth and Fifth Amendments have been violated and the property "so secured" may be regained. (*Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 386, 202, footnote; *Boyd v. United States*, 116 U. S. 616, 634-5; *Feldman v. United States*, 322 U. S. 487, 492.)

(b) The proceeding in which the subpoenas *duces tecum* had been issued was an independent proceeding and inquiry before the "Special Grand Jury" (now conceded to be a body without status in law). That proceeding was docketed as "Misc. No. 5301", and the papers therein were entitled (to quote the caption of the order of June 3, 1946, impounding the seized documents):

IN RE GRAND JURY INVESTIGATION

ENTITLED

UNITED STATES

v.

WALLACE & TIERNAN CO., INC., ET AL."

This order recited that the documents had been "subpoenaed on behalf of the Special Grand Jury"; and the

subpoenas themselves (to quote the typical body of those dated August 26, 1946) read:

"YOU ARE HEREBY COMMANDED to appear before the Special Grand Jury, of the District Court of the United States for the District of Rhode Island * * * and also that you bring with you and produce at the time and place aforesaid, the books, papers and documents designated as Exhibit A attached hereto and made a part hereof, then and there to testify concerning certain matters under investigation by the said Special Grand Jury."

(c) Simultaneously with their aforesaid motion to dismiss the "Indictment", these defendants (other than Builders Iron Foundry and Chafee) petitioned for a decree compelling the return to them of their property, to wit: the several hundred thousand papers seized, impounded, searched and used by the Department of Justice and the "Special Grand Jury" in the course of the so-called "Grand Jury Investigation" preceding the so-called "Indictment", and hence prior to the criminal action purportedly instituted thereby. The like motion by the defendants Builders Iron Foundry and Chafee was made after the dismissal of the "Indictment".

Thus, the seizure, impounding, search and use of these papers in the present case differ entirely from an instance where the papers were unlawfully secured under color of procedure in a pending criminal action lawfully instituted and continued, to obtain evidence for the trial thereof.

Moreover, since the "Grand Jury Investigation" and the "Indictment" were, as is now conceded, nullities in law, there was, in the eye of the law, no subsequent criminal action instituted thereby, and hence, no action at all in which the subpoenas, the impounding order and the decree for return could be regarded as intermediate.

Thus, the proceeding to recover the defendants' property was in essence and necessity and in fact and in law an autonomous and complete proceeding which was directed to annulling an unlawful taking and detention originating before any action was begun, and which was effectuated at a time when no lawful action was pending.

The decree entered March 19, 1947, directing the return was, therefore, a final decree from which the plaintiff could have appealed to the United States Circuit Court of Appeals under section 225, Title 28, U. S. C., A. (*Essgee Co. v. United States*, 262 U. S. 151, 152; *Cohen v. United States*, 278 U. S. 221, 226.)

Moreover, the plaintiff immediately complied with the decree and thereby added to its finality in law finality in fact.

(d) The issues of law and fact thus finally determined as between the parties by this decree were thus expressed by the District Court in its *oral* opinion of March 19, 1947 (Tr. 98);

"The Court: There is no need of further discussion on this because the Court has already ruled the Grand Jury was illegally constituted. These papers were obtained as a result of subpoenas issued by an illegally constituted Grand Jury. Certainly defendants have a right to the return of their property under those circumstances. The motions for the return of the impounded documents are granted."

(e) Thus, here again, determinations of the issues of law and fact became final and *res judicata* between the same parties for all purposes and proceedings, and the papers became *not* "admissible in evidence at any hearing or trial," (Rule 41e of the Federal Rules of Criminal Procedure.)

(5)

Likewise, the decree of February 18, 1948, directing delivery to the defendants of the photostatic copies made by the Department of Justice of some of their subpoenaed and impounded documents, was final in law; and the plaintiff also gave it finality in fact by complying therewith and by not appealing therefrom.

(a) On May 9, 1947,—some weeks after the dismissal of the "Indictment"—the defendants petitioned for the delivery to them of the photostatic copies made by the Department of Justice of some 7,000 of the 200,000 papers subpoenaed and impounded as aforesaid. Some of the papers so photostated had been put in evidence before the "Special Grand Jury."

This petition for the delivery of these photostatic copies was an independent and separate proceeding. It was entitled:

"In the Matter

of

Misc. No. 5347

Motion of Wallace & Tiernan
Company, Inc., et al., for re-
turn of documents."

(b) Such a proceeding has been held equivalent to an independent summary suit in equity. (*Essgee v. United States*, 262 U. S. 151, 152-3; *United States v. Rosenwasser*, 145 Fed. [2d] 1015, 1017, C. C. A. 9.)—Hence, the decree made therein was a final decree, not made in the purported criminal action which long previously had been dismissed as aforesaid; and it was appealable to the Circuit Court of Appeals under Section 225 of Title 28, U. S. C. A.

* The like petition by the defendants Builders Iron Foundry and Chafee was filed at a somewhat later date.

To quote the *Rosenwasser* case just cited (p. 1016-7):

Where no criminal action against him is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the court's order therein is appealable as a final decision. *Burdeau v. McDowell*, 1921, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 159; *Pertman v. United States*, 1918, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; *Cheng Wai v. United States*, 1942, 2 Cir. 125 F. 2d 915; *United States v. Poller*, 1930, 2 Cir., 43 F. 2d 911, 74 A. L. R. 1382."

It is also the universal holding that where, at the time when the application to suppress evidence or return papers is initiated, the criminal action for the purposes of which the evidence had been unconstitutionally seized, had not been begun or had been dismissed, such application is deemed an independent, separate proceeding equivalent to an independent suit in equity. A final determination therein is appealable to the Circuit Court of Appeals:

Cogen v. United States, 278 U. S. 221, 225-6;

United States v. Byoir, 147 F. 2d 336, 337 (C. C. A. 5);

United States v. Rosenwasser, 145 F. 2d 1015, 1016-7 (C. C. A. 9);

In re Investigation by Attorney General, 104 F. 2d 658, 659 (C. C. A. 2);

United States v. Poller, 43 F. 2d 911, 912 (C. C. A. 2);

Dickhart v. United States, 16 F. 2d 345, 346, Court of Appeals, District of Columbia;

In re Brenner, 6 F. 2d 425 (C. C. A. 2); 156 A. L. R. Ann. 1207, 1211.

To quote from the opinion in *Cogan v. United States*, 278 U. S. 221, *supra* (p. 225):

"Where the proceeding is a plenary one, like the bill in equity in *Dowling v. Collins*, 40 F. (2d) 62, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution. Applications for return of papers or other property may, however, often be made by motion or other summary proceeding, by reason of the fact that the person in possession is an officer of the court. See *United States v. Maresca*, 266 Fed. 713; *United States v. Hee*, 219 Fed. 1019, 1020. Compare *Weinstein v. Attorney General*, 271 Fed. 673. Where an application is filed in that form, its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case. The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, whenever the application for the papers or other property is made by a stranger to the litigation, compare *Ex parte Tiffany*, 252 U. S. 32; *Savannah v. Jesup*, 106 U. S. 563; *Gumbel v. Pitkin*, 113 U. S. 545; or wherever the motion is filed before there is an indictment or information against the movant, like the motions in *Perlman v. United States*, 247 U. S. 7 and *Burdeau v. McDowell*, 256 U. S. 465; or wherever the criminal proceeding contemplated or pending is in another court, like the motion in *Dier v. Banton*, 262 U. S. 147; or wherever the motion, although entitled in the criminal case, is not filed until after the criminal prosecution has been disposed of, as where under the National Prohibition Act a defendant seeks, after acquittal, to regain possession of liquor seized. And the independent character of a

summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court. This was true in *Essgee Co. v. United States*, 262 U. S. 151, where the petition was entitled as a separate matter and was referred to by the court as a special proceeding." (Italics ours.)

(c) In granting the petition for the delivery of the photostats, the District Court rendered its opinion on February 6, 1948. That opinion was entitled "In the Matter of Motions of Wallace & Tiernan Company, Inc., et al., for the Return of Documents." It determined the law as follows:

"In *Johnson v. United States*, decided February 2, 1948 (16 L. W. 4133, 4135), the Supreme Court said:

"Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects," and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

"It is my opinion that the Government, gaining access to the documents by means of an illegal grand jury, has no 'valid basis in law for the intrusion,' which the Government committed in making the photostats of said documents and retaining possession of them."

A "decree" accordingly was entered on February 18, 1948, and was complied with by the plaintiff without appeal.

Thus, here for a third time, determinations of issues of law and fact became final and *res adjudicata* between the same parties for all purposes and proceedings; and the plaintiff added to the finality in law finality in fact by its compliance.

Moreover, by command of Rule 41(c) of the Federal Rules of Criminal Procedure, the photostats were henceforth *not admissible in evidence at any hearing or trial.*

(d) At the foot of its opinion of February 6, 1948, the Court made the following notation:

"Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment."

But this notation could not possibly change the facts, stated above, that the Indictment had already been dismissed *before* the petition for the delivery of the photostats was presented; and that the petition was in fact and in law an independent and separate proceeding which would and could not be converted into a non-existent something else by such a notation. (*Conywise Lumber & Supply Co. v. United States*, 259 Fed. 847, 849, C. C. A. 2.)

(e) The Department of Justice had no lawful right whatever to take advantage of its unlawful and temporary possession of the defendant's property (secured in the name of a grand jury investigation) to perpetuate such unlawful possession by taking and permanently retaining photostatic copies thereof. There is not a syllable in the United States Constitution or in any statute which authorizes any such indirect means of transferring to the files of an agency or bureau of the Executive reproduction of a citizen's private papers and the permanent retention of them there. The spirit of our Constitution and the American Tradition cry out against such a desecration of private rights and liberties.

If the Department of Justice has the right to photograph papers acquired without right and to retain the photographs, then we have the anomaly of a wrong becoming a right.

The settled law on this subject is thus succinctly stated in the first headnote to the decision of Judge Learned Hand in *United States v. Kraus*, 270 Fed. 578:

"When papers of parties subsequently indicted are seized upon an illegal search, the papers *and all copies taken while the officers retained their illegal possession* must be returned, and any information obtained therefrom must not be used at the trial or in its preparation." (Italics ours.)

To the same effect are:

Essgee Co. of China v. United States, 262 U. S. 151, 156;

Silverthorne Lumber Co. v. United States, 251 U. S. 385;

Flagg v. United States, 233 Fed. 481, 486 (C. C. A. 2);

United States v. Brasley, 268 Fed. 59, 65;

United States v. Spallino, 21 F. (2d) 567, 568.

The prohibitions and consequent bar of the Fourth and Fifth Amendments operate as much in a civil case as in a criminal case. (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Rogers v. United States*, 97 F. (2d) 691, 692, C. C. A. 1; Rule 41e of the Federal Rules of Criminal Procedure.) —

(6)

Furthermore, the decree of April 20, 1948, in Criminal Action 6070 (instituted by Information after the dismissal of the Indictment), suppressing any evidence obtained from the documents ordered by the aforesaid decrees to be delivered to the defendants, is given finality by Rule 41(e) of the Rules of Criminal Procedure for the District Courts of the United States.

(a) As stated above, the Department of Justice, on May 1, 1947, over a month after the dismissal of the purported "Indictment", filed an Information under the Sherman Act in phraseology and subject matter identical with the Indictment and against the same parties. This Information was thereupon docketed as "Criminal Action Number 6070."

In that action, the defendants, on July 25, 1947, made a motion to dismiss the "Information", or, in the alternative, to preclude the plaintiff from using any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents. This latter alternative was expressed in paragraph 3 of the Notice of Motion.

By opinion dated April 14, 1948, the District Court reviewed all the prior proceedings and the determinations made therein under the Fourth and Fifth Amendments of the Constitution of the United States; denied the motion to dismiss on the ground that evidence not inhibited might be obtained "in support of the allegations in the information"; but, on April 20, 1948, entered a "decree":

"* * * precluding and restraining the United States from using, in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents."

The Department of Justice has never taken any further steps in the criminal action instituted by this "Information", and has not attempted to appeal from that decree.

(b) Rule 41 of the Rules of Criminal Procedure for the District Courts of the United States is entitled "Search and Seizure"; and paragraph (c) thereof is entitled "Motion for Return of Property and to Suppress Evidence."

This paragraph (c) provides, among other things, that where property "was illegally seized" in the name of law enforcement and a "motion" for its restoration has been made and granted, "it (the property or the evidence supplied thereby) shall not be admissible in evidence at any hearing or trial."

This Rule implements the Fourth and Fifth Amendments to the Constitution of the United States according to the principles declared in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 391. It does so by operating *in rem* upon the property or evidence illegally seized or acquired. It designates a special "motion" "for the return of the property and to suppress for use as evidence anything so (illegally) obtained", as the appointed procedure for definitive determination of the issues as to illegality and suppression; and it renders the determination thereof applicable and effective "at any hearing or trial."

We need not stop to consider whether the theory of this Rule is the analogy of an *in rem* proceeding, or is the principle of *res judicata*, or is the recognition of such a motion as an independent proceeding equivalent to "an independent suit in equity". (*United States v. Rosencwasser*, 145 Fed. [2] 1015, 1016-7 [C. C. A. 9]; *Essig Co. v. United States*, 262 U. S. 151; 152-3; *Fowler v. Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10].) It is sufficient that, whatever the theory or theories of the Rule, the Rule's

mandate and effect make the determination applicable and conclusive "at any hearing or trial" wherever such issues may again arise.

(c) The plaintiff never attempted to test out a right of appeal from the final determination made by the District Court under that Rule.

In consequence, here for the fourth time, the plaintiff has allowed a decree of the District Court and the determinations of law implicit therein to become final and conclusive.

Such decree was not, and could not be, confined by its terms to Criminal Action Number 6050, but was comprehensive of and determinative against any use by the plaintiff anywhere or at any time, of the illegally seized papers and the illegally acquired evidence. Such evidence "shall not be used at all." (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392.)

(7)

Summary

To sum up, we have this situation:

(a) The plaintiff did not appeal from the final judgment determining that the so-called "Special Grand Jury" was an unconstitutional body convened and "investigating" in violation of the Fourth and Fifth Amendments guaranteeing due process and the protection of private property, and dismissing the "Indictment (No. 6055)" on that ground. The Department of Justice concedes that such determination and judgment were correct.

(b) The plaintiff did not appeal from the final decree of March 19, 1947, directing the return of all the property compulsorily produced, seized, detained and

searched under the purported process and for the purposes of this unconstitutional Special Grand Jury on the ground that such seizure and search were not pursuant to constitutional process or for a constitutional purpose and violated the Fourth and Fifth Amendments:

(c) The plaintiff did not appeal from the final decree of February 18, 1948 directing the delivery to the defendants of the photostatic copies made by the Department of Justice of some of the seized papers while the seizure continued.

(d) The Department of Justice complied with both these decrees and thereby gave them finality in fact as well as in law.

(e) The Department of Justice did not appeal from the decree of April 20, 1948, suppressing the use of the illegally seized property and evidence. See Rule 41(e) of the Federal Rules of Criminal Procedure.

These determinations, unappealed from, and, as to the decrees of March 19, 1947, and April 20, 1948, finally and fully executed, are not the subject of appeal, review, recall, annulment or limitation, by direction or indirection, in this civil action between the same parties and involving the same charges and allegations under the same Sherman Law. This, we submit, for the following reasons:

(a) The plaintiff's right to appeal is purely statutory. No statute authorizes the plaintiff to secure, or gives the Supreme Court jurisdiction to afford, an appeal from such determinations in the manner here attempted.

(b) A civil action cannot be used as a medium for appealing from and seeking annulment of decrees and determinations made, consummated and fulfilled in

some other action or proceeding between the same parties. No such "collateral attack" is permissible. (*Fowler v. Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10]; *Coffey v. United States*, 116 U. S. 427, 443; *Fowler v. Gill*, 156 Fed. [2] 565, 566 [D. C. App.].)

(c) The Fourth and Fifth Amendments cannot be stultified by allowing the Department of Justice, in a civil action, to subpoena or have discovery of papers and evidence which were ordered returned and suppressed in some other action or proceeding as obtained by the Government in violation of these Amendments.

(d) The plaintiff's course in complying with, and in not appealing from, determinations made in other proceedings, cannot be re-called, cured or avoided, or the plaintiff's time to appeal be indirectly extended, by allowing the plaintiff to retrace its course and start over again under cover of a civil action involving identical parties, allegations, subject matter and charges.

(e) Since the parties, issues, subject matter and charges are the same, the determinations made in the other proceedings are *res adjudicata*. (*Fowler v. Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10]; *Coffey v. United States*, 116 U. S. 427, 443; *Fowler v. Gill*, 156 Fed. [2] 565, 566 [D. C. App.].)

(f) Rule 41(e) of the Federal Rules of Criminal Procedure, effective March 21, 1946, expressly provides that evidence or papers suppressed by an order entered on a "motion" shall not hereafter be "admissible in evidence *at any hearing or trial*". In consequence, even if (contrary to the fact and the law) the decrees for the return of the original papers and the delivery of the photostatic copies were merely interlocutory for the purpose of judging their appealability, nevertheless this Rule makes the determinations therein of unconstitutional governmental action

conclusive in "any" action or proceeding or hearing where the issue again arises between the same parties.

(g) The effect of no one of the prior determinations was confined by its terms to the particular proceeding in which it was rendered. Each of the decrees was comprehensive in its determination of the violations of the Constitution and the consequent complete unavailability to the Department of Justice of the evidence or documents for any purpose.

(h) The determinations in the prior proceedings have been executed, consummated and fulfilled and such fulfillment cannot be recalled in this action.

V

The effect of the foregoing on this civil action and on this attempted appeal and on the jurisdiction of the Supreme Court of the United States.

For the reasons and on the "Grounds" already stated, we submit that the Supreme Court of the United States is without jurisdiction, and that this attempted appeal should be dismissed as not properly taken and as an attempt to challenge a judgment which the appellant itself invited and phrased.

But we further submit that the foregoing also establishes that this attempted appeal should be dismissed as merely an inadmissible effort to obtain appellate review and re-call in this civil action of determinations, repeatedly made in various prior proceedings, of the identical issues between the identical parties and on identical allegations.

The three motions which the plaintiff made in this civil action in April, 1948, all ran *solely* to the several thousand documents (property of the defendants) which

had been photostated as aforesaid by the plaintiff during the illegal but so-called Grand Jury Investigation, and to the photostats thereof ordered returned as aforesaid by the decree of February 18, 1948. (See appellant's "Statement as to Jurisdiction," p. 4.)

These motions in this civil action were entitled:

- (1) "Motion to vacate order on motion for return of photostat copies of documents";
- (2) "Motion for production of documents under Rule 34";
- (3) "Motion for production of photostatic copies of documents surrendered by plaintiff."

So, likewise, the subpoenas *duces tecum* served herein by the Department of Justice in May, 1948, ran *solely* to the same documents photostated by the Department as aforesaid. (See appellant's "Statement as to Jurisdiction," p. 4.)

Obviously, these four procedures were merely attempts in this civil action to appeal, re-argue, re-call and annul the aforesaid determinations and decrees on the identical subject matter, allegations and issues, which had been made in the prior proceedings between the same parties and to which the plaintiff had given finality in fact and in law by compliance and failure to appeal.

Also, obviously, the District Court was right in the concluding statement in its opinion of May 26, 1948, that (p. 18):

"It seems to me that these motions are an attempt on the part of the Government to *reargue* in this civil action matters which have been decided in the criminal case and from which the Government did not appeal."
(Italics ours.)

For like reason, the District Court was also right in its decree of June 1, 1948, vacating the aforesaid attempted

subpoenas *duces tecum* for the very papers which, by the prior determinations and decrees, the District Court had repeatedly held could no longer be used by the Government.

In consequence, for these additional reasons there is no admissible basis for jurisdiction in the Supreme Court of the United States or for this attempted appeal.

The Government's right to appeal is purely statutory; and there is no statute for an appeal by it in a civil action from determinations and decrees previously made in other proceedings between the same parties.

Moreover, no appeal ever lies from the denial of a motion for reargument, however the true nature of such motion may be disguised or be given form and medium.

VI

Reply to certain assertions in the appellant's "Statement as to Jurisdiction".

1. The appellant's Statement is vitiated by its complete ignoring of the Fifth Amendment to the Constitution of the United States and of the part which it has played and must play in this subject matter.

2. It also completely ignores Rule 41(e) of the Rules of Criminal Procedure for the District Courts of the United States and its obvious applications to this subject matter, as above shown.

3. By conceding (p. 3) that the principles of constitutional law on which the District Court annulled the so-called "Grand Jury Investigation" and dismissed the purported "Indictment" were correct, the appellant's Statement must forego any challenge of the conclusive character of those determinations of law and fact wherever, when-

ever and in whatever form the same issues may arise, expressly or implicitly, between the same parties.

4. The appellant's Statement says (p. 8): "Orders on motions to suppress, entered after an indictment has been returned or an information filed, are not appealable". This statement is irrelevant, and, as an attempted generalization, is also inaccurate and inapplicable, for the numerous reasons above stated.

5. The appellant's Statement also says (p. 8): "Only final orders may be relied upon as *res judicata*". Here, again, the attempted generalization is both inapplicable and inaccurate, for the numerous reasons above stated.

6. The appellant's Statement constantly speaks of "*the right of the Government*" to do this or that.

It would be well to have in mind that in matters of justice and the administration of justice, the Department of Justice is not "the Government." It is merely an attorney for a plaintiff appearing before the Judicial Branch of the United States Government, which Branch is independent of the Executive and is, as regards the juridical rights of the parties, *the* Government so far as such term can have any pertinency at all.

7. The appellant's Statement says (p. 6):

"There is, on the other hand, no actual search or seizure when documents are produced pursuant to legal process."

This may be true if the word "actual" means "unlawful" and the word "legal" means "lawful". Otherwise, the Fourth Amendment would be reduced "to a form of words." (*Silverthorne Lumber Co. v. United States*, 251 U. S. 381, 392.)

8. The cases cited in the appellant's Statement (pp. 6, 7) to the effect that where a subpoena *duces tecum*, lawfully issued for production of papers before a lawful officer or body, is "suitably specific and properly limited in its scope," "there is no unreasonable search and seizure within the meaning of the Fourth Amendment," are irrelevant and the argument begs the question. Such is not the only requirement of the Fourth Amendment. There must also be lawful authority and lawful purpose.

The point here is not that the subpoenas were too broad, indefinite or unreasonable, but that they were issued in a purported investigation by, and for compulsory disclosure of papers before, an unconstitutional body having no lawful authority whatever to conduct such investigation or to have process for its aid.

9. The appellant's Statement speaks (p. 6) of distinguishing "between cases of actual search and seizure and cases of the 'figurative' or 'constructive' search involved in the production of books or records in obedience to judicial process." It cites *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 202. That case involved the authorized issue of a reasonable subpoena by a lawfully authorized officer, to wit: the Administrator of the Fair Labor Standards Act.

But the citation of that case is unfortunate for the appellant for, on the very page cited, the opinion therein recognizes as expressive of the law the following quotation in the footnote (p. 202):

"In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a reasonable exercise of the power." *Lasson, Development of the Fourth Amendment to the United States Constitution*, 437, citing *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Hale v. Henkel*, 201 U. S. 43, 76; Cf. *Boyd v. United States*, 116 U. S. at 634, 635. (as to which see also notes 33 and 36);

" * * We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited * * * is the equivalent of a search and seizure and an unreasonable search and seizure within the meaning of the Fourth Amendment."

10. Finally, the appellant's Statement presents, as its chief reliance, the obviously fallacious and irrelevant theories: (1) that the subpoenas *duces tecum* issued by and for the "Special Grand Jury" were not process to be judged as to validity according to the Fifth Amendment; and (2) that the subsequent search, examination, use and photostating of the documents thus compulsorily secured were not search and seizure to be judged as to validity according to the Fourth Amendment.

The emptiness of these contentions is conclusively refuted by the very contents of the subpoenas *duces tecum*, quoted under IV (4), *supra*, and by the concession that the "Special Grand Jury" and the "Indictment" were rightly annulled.

In the argument on March 19, 1947, Mr. Karsted (Assistant Attorney General) expressly conceded (pp. 94, 95) that "the documents were originally brought in pursuant to a Grand Jury subpoena," and that "the Court got them as a result of an illegal process."

If the appellant's present contentions could, by any possibility, uphold the right of the Department of Justice to retain indefinitely the photostatic copies, they would equally have upheld the right of the Department to retain indefinitely the originals, notwithstanding the annulment of both the unconstitutional "Grand Jury" and its "Indictment."

If, as the District Court held, the taking itself (which taking was *ex muneris* for the use of the "Special Grand Jury" and in a proceeding alleged to be before it), was illegal and without constitutional authority, the exercise of opportunities which such illegal taking afforded to the

Department of Justice and to the illegal body was necessarily tainted with the illegality of the taking itself. For there was no other source for either the opportunity or the exploitation of it. As this Court quite properly said on March 19, 1947, in granting the defendants' motion to annul the taking itself (Tr. p. 95):

"When there are documents that grow out of a grand jury process that has now been held to be an illegal grand jury, doesn't everything that belongs with it become tainted with that illegality?"

Certainly, if by taking advantage of a subpoena issued colorably for the use of a grand jury which has no constitutional existence, the Department of Justice can possess itself lawfully of the private papers of a private citizen, or give itself the right to make copies thereof, an administrative department of the Government will thenceforth be clothed with an extra-legal process for seizure and search of private papers and for the indefinite retention and use thereof and of all the information contained therein, not only contrary to the express prohibitions of the United States Constitution, but without any justification in the common law. As said by the Supreme Court of the United States in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 391-2:

"* * * The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had. * * * In our opinion such is not the law. It reduces the Fourth Amendment to a form of words, 232 v. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." (Italics ours.)

11: We conclude this subject by quoting the following pertinent language from *Feldman v. United States*, 322 U. S. 487, 492:

" * * * When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, *Go-Bart Co. v. United States*, 282 U. S. 344, and its admission, after timely motion for its suppression, vitiates a conviction. *Ryars v. United States*, 273 U. S. 28."

CONCLUSION

Jurisdiction should be refused or, in the alternative, the attempted appeal should be dismissed.

Dated, November 4, 1948.

Respectfully submitted,

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IS THE
Supreme Court of the United States
October Term, 1948

UNITED STATES OF AMERICA,
Appellant,
v.
WALLACE & TIERNAN COMPANY, INC., *et al.*,
Appellees.

REPLY MEMORANDUM FOR APPELLEES

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IN THE
Supreme Court of the United States
October Term, 1948

UNITED STATES OF AMERICA,

Appellant,

v.

WALLACE & TIERNAN COMPANY, INC., et al.,

Appellees.

REPLY MEMORANDUM FOR APPELLEES

There was error in the Appellant's failure to appeal from the final judgment of September 3, 1948, but the *Hoiness* decision of this Court has been handed down since our Statement and Motion were filed. That decision brushes aside such errors on appeal. As the error in question does not affect the merits of the Motion, we do not press the point.

1

The plaintiff is without legal right to appeal from the judgment.

(1) The judgment of dismissal was, at the plaintiff's own request, "*without prejudice*",—thereby reserving to the plaintiff the privilege and benefit of re-instituting suit and of excluding as a defense *res adjudicata*.

As set forth in our Original Memorandum (pp. 2, 12, 13), the plaintiff's counsel first suggested on April 20, 1948, that a judgment be entered "*with prejudice against the Government*"; but on May 24, and August 27, 1948, he requested and obtained a judgment "*without prejudice*". The plaintiff must have regarded as valuable and useful to it this benefit and privilege.

(2) The Appellant's statement (p. 4) that the District Court's conclusion that "the reality" was non-prosecution was based on one limited fact (viz., the admission of plaintiff's counsel as to the possibility of obtaining additional evidence) is not correct. The whole course of conduct of plaintiff's counsel in trying to obtain an artificial judgment by means of which it could in turn attempt to attack determinations which had already become conclusive, *res adjudicata*, and complied with in other actions and proceedings, formed the actual basis and reason for the Court's ruling.

(3) As set forth in our Original Memorandum (pp. 5-15), there never was a trial "in the usual sense of the word",—to quote the plaintiff's own assurance as to what would happen in the courtroom on June 2, 1948 (Tr. 4). "The Government does not intend to offer evidence if a date (for trial) is granted as we have requested" (May 24, 1948; Tr. 11).

Indeed, the plaintiff's counsel went so far as to assure the defendants at the opening on June 2nd that they need be ready with no defense, and that they would not be prejudiced if they adopted the role of spectators. It was on "that understanding" that the Court allowed the plaintiff's counsel to go forward with its prearranged pantomime to bring about a judgment of dismissal "without prejudice." (Our Original Memorandum, pp. 5-7.)

(4) For these reasons, the argument in the Appellant's brief (p. 4) that there *was* a trial in the usual sense of the term; that the plaintiff was proceeding in the court room with bona fide intention to prove a case; and that the judgment of dismissal "without prejudice", and hence, with the right to sue anew, was not a judgment of nonsuit entered in accordance with the plaintiff's request, is contrary to the facts and is without merit in law.

(5) The elementary rule is thus stated in *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 Fed. (2d) 296, 297:

"But, although a voluntary nonsuit is a final termination of the action, it has been entered at the request of plaintiff, and he may not, after causing the order to be entered, complain of it on appeal. For this reason, it is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit. *U. S. v. Evans*, 5 Cranch, 280; 3 L. Ed. 101; *Evans v. Phillips*, 4 Wheat. 73, 4 L. Ed. 516; *Central Transportation Co. v. Pullman's Palace-Car Co.*, *supra*; *Francisco v. Chicago & Alton R. Co.* (C. C. A. 8th), 149 F. 354, 9 Ann. Cas. 628. And this is in accordance with the great weight of authority. See 2 *Am. Jur.*, Appeal and Error, p. 974; *Kempland v. Macauley*, 4 T. R. 436; *Ewing v. Glidewell*, 3 How. (Miss.) 332, 34 Am. Dec. 96; note, 9 Ann. Cas. 631-633, and cases there cited."

(6) The cases cited by the Appellant on page 7 were all cases where the judgment of nonsuit was not proposed, arranged and phrased by the plaintiff, but was at the

instance of the defendant or the court. For example, in *Wilson v. Republic Iron Co.*, 257 U. S. 92, the District Court had imposed upon the plaintiff certain costs which were not paid within the time fixed, with the result that the complaint was dismissed,—an obviously appealable judgment.

II

The underlying assumption in the Appellant's brief that it can use the civil action as a means for appealing from decrees which were made in other actions and proceedings and from which it did not appeal, is obviously without merit and is frivolous.

(1) The Appellant's Brief postulates that merely because, on June 2, 1948, at a so-called trial which its counsel announced would not be a trial "in the usual sense of the word" (Tr. 4), it unsuccessfully offered what it now calls evidence, it thereby secured the substantive right to conduct an appeal not merely nominal and frivolous.

As we have shown in our Original Memorandum, this so-called "evidence" was really no evidence at all (pp. 7-9). Irrespective of any question of legality or prior adjudication, it was immaterial, irrelevant and incompetent, and rightly excluded as such.

(2) But, aside from its inadmissibility for these reasons, the so-called evidence was clearly barred by reason of the fact that it was the very evidence which had been obtained by unconstitutional seizure and search and by unconstitutional process and was, therefore, inhibited to the Government;—precisely as the District Court had, by final decrees, determined in the so-called "Grand Jury Investigation," and in the action purportedly instituted by the "Indictment", and in the action instituted by the Criminal Information, and in the special proceeding for

the delivery to the defendants of the photostatic copies. (See our Original Memorandum, pp. 16-28.)

(3) Thus, by now claiming that it seeks to test the rulings excluding this inadmissible evidence at the nominal trial, the plaintiff is in effect seeking (under guise of appealing from a judgment entered in this civil action in accordance with its own planning and request and phrased for its own benefit), to bring up for review determinations made in other actions and proceedings from which it did not appeal, which it allowed to become final, which it complied with, and which, in the case of the basic determination, it itself has pronounced correct. (See our Original Memorandum, pp. 16-28.)

Obviously, this cannot be done; and any such attempted appeal is inadmissible, fictitious and frivolous.

(4) In addition to the judicial decisions cited in our Original Memorandum (pp. 32-33), we cite *Reed v. Allen*, 286 U.S. 191; *Ferrer v. Bank of Nova Scotia*, 135 Fed. (2d) 41, 42 (C. C. A. 1); *Hatchitt v. United States*, 158 Fed. (2d) 754, 755 (C. C. A. 9).

In the *Reed* case, *supra*, the United States Supreme Court said (p. 198):

"It is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment."

This further language in the *Reed* case is directly applicable (p. 198):

"The predicament in which respondent finds himself is of his own making, the result of an utter failure to follow the course which the decision of this court in *Buller v. Eaton*, *supra*, had plainly pointed out. Having so failed, we can not be expected, for his sole relief, to upset the general and well established

doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship. *United States v. Throckmorton*, 98 U. S. 61, 65, 68-69."

III

The Appellant's brief ignores entirely the legal consequences and corollaries in this action of the Appellant's own admission both in the District Court (Tr. p. 30, April 20, 1948) and in its Statement as to Jurisdiction (p. 3) that the District Court correctly determined that the so-called "Grand Jury Investigation" and the "Indictment" and the "Special Grand Jury" itself were not lawful or constitutional.

(1) In consequence, the decree to that effect, and all the determinations of law and fact implicit in that decree, have at all times since been final, undisputed and *res adjudicata* as between the same parties in all proceedings and actions.

The grand jury subpoenas *duces tecum*, which were part of that unconstitutional "Grand Jury Investigation" and in aid thereof, constituted compulsory production and were followed by both seizure and search of the papers. Furthermore, they were the taking of private property without due process. For both of these reasons, the acquisition by the Department of Justice of the information and evidence contained therein was unconstitutional. (See Our Original Memorandum, pp. 20-22; and *United States v. Cole*, 6 F. R. D., 581.)

Indeed, this Court has expressly held in *Wilson v. United States*, 221 U. S. 361, that a subpoena *duces tecum* in a criminal inquiry is violative of the constitutional Amendments unless issued by "duly constituted authority" (p. 382). See also *Fleming v. Montgomery Ward Co.*, 114 Fed. (2d) 382, 384 (C. C. A. 7).

Hence, such evidence so illegally secured "shall not be used at all". (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392.) It cannot be used in a civil action duplicating in subject matter the criminal proceeding in which it was obtained. (Our Original Memorandum, p. 28; and *United States vs. Phoenix Cereal Beverage Co.*, 65 Fed. (2d) 398, 399; C. C. A. 2.)

"The (Fourth) Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." (*Go-Bart Co. v. United States*, 282 U. S. 344, 357.)

"The amendment cannot be circumvented by the indirect use against the victim of evidence so obtained." (*Goldstein vs. United States*, 316 U. S. 114, 120.)

The character of a proceeding to redress an illegal seizure is determined by the relief sought and not by its title. (*Freeman vs. United States*, 160 Fed. (2d) 69 (C. C. A. 9).)

IV

The Appellant's memorandum also completely overlooks the conclusive character of Rule 41(e).

As set forth in *United States v. Janitz*, 6 F. R. D. 1, 2 (appeal dismissed 161 F. (2d) 19), this Rule in its preliminary drafts provided that the evidence illegally secured "shall not be admissible in evidence at any hearing or trial of the proceeding in connection with which the seizure occurred."

The limitation italicized was finally eliminated. That elimination, as well as the comprehensive character of the language remaining, show conclusively that the order made on the motion provided for in that Rule is to be conclusive not only in the proceeding in which it was entered but "at any hearing or trial" where the inhibited evidence is offered.

Dated, December 2, 1948.

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FILED

MAR 22 1949

CHARLES ELMORE CRUPLEY
CLERK

No. 416

Supreme Court of the United States

October Term, 1948

THE UNITED STATES OF AMERICA,

Appellant,

vs.

WALLACE & TIERNAN COMPANY, INC., ET AL.,

Appellees.

Appeal from the United States District Court
for the District of Rhode Island

BRIEF FOR APPELLEES

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It announced to the Court below, and has announced to this Court, that it "accepted" that decision as "correct" and chose not to appeal

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Supreme Court of the United States

October Term, 1948

THE UNITED STATES OF AMERICA,

Appellant,

vs.

WALLACE & TIERNAN COMPANY, INC., ET AL.,

Appellees.

**Appeal from the United States District Court
for the District of Rhode Island**

BRIEF FOR APPELLEES

This appeal by the United States is from a decree of the United States District Court for the District of Rhode Island, entered August 6, 1948, "dismissing the action without prejudice and the Government's request for judgment and relief prayed for in the complaint is denied" (R. 242).

After the order allowing this appeal had been entered on October 4, 1948 (R. 244), the Solicitor General filed under Rule 12 of the Supreme Court of the United States, a "Statement as to Jurisdiction". Thereupon the appellees, pursuant to paragraph 3 of the same Rule, did

"1. File a Statement of Matters and Grounds making against the Jurisdiction of the Supreme Court of the United States; and

2. Move to dismiss the attempted appeal."

The appellees' paper embodying this "Statement" and "Motion", together with their "Reply Memorandum" answering an opposing memorandum from the Solicitor General, are now on file with this Court, and will be before the Honorable Justices on the argument, by reason of the following direction of this Court on December 28, 1948 (R. 382):

"The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss is postponed to the hearing of the case on the merits."

Statement

We believe that we will best aid the Court by setting forth under the ensuing Points the related facts, and by confining our present Statement to correcting the perspective in the appellant's Statement.

(1) On page 7, appellant states that, in granting the appellees' motion for delivery of the photostats, the District Court said that the grand jury subpoenas *duces tecum* issued prior to the indictment "did not violate the Fourth Amendment" (R. 84). This expression by the District Court was an abbreviated repetition of its original denial of the defendants' motions on May 26, 1946 (months before the indictment) to vacate those subpoenas on the ground that they were so unreasonable and oppressive *in scope* as to violate the Fourth Amendment (R. 82). That the court's expression was not a contradiction of any ruling by it after the indictment, is demonstrated by the court's immediately following utterance (R. 84): . . .

"It seems to me that when the grand jury turned out to be illegally constituted and the indictment was

dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment."

(2) The indictment (No. 6055) was filed on November 18, 1946. Promptly thereafter the defendants moved to dismiss it and for the return of the subpoenaed documents on the ground that the "grand jury" had, as against the defendants, no status or authority in law and that its actions had violated the defendants' constitutional rights (R. 89).

These motions were granted by a final decision on March 19, 1947 (R. 56, 70). Both in the court below and in this Court, the appellant has announced that it "accepted" that decision as "correct" (R. 102; and appellant's "Statement as to Jurisdiction", p. 3); and, in consequence, did not exercise the right which it admittedly had to appeal (*id.*). The appellant immediately complied; forthwith returned all the subpoenaed papers; and the so-called "grand jury" and its so-called "investigation" immediately and automatically ceased to exist. (For a more extended statement, see Point I, *post.*)

Instead of summoning a new grand jury, the Justice Department, on May 1, 1947, filed a "Criminal Information (docket No. 6070)", making (as the appellant's brief concedes, p. 7), "the same charges against the same defendants as those made in the indictment (No. 6055) which had been dismissed."

(3) After unsuccessful demands on April 7, May 2 and May 5, 1947 (R. 50, 79, 80), the defendant, on May 9, 1947, petitioned for delivery to them of all photostatic copies which the Justice Department had made of the subpoenaed papers while it and the "grand jury" had them in their possession (R. 76-80).

This petition was an independent and separate proceeding entitled "In the Matter of Motion of Wallace & Tiernan Company, Inc., et al., for Return of Documents"; and it was given a separate docket number, to wit: "Misc. 5347" (R. 75, 76). No counter-affidavit or other proof was filed by the Justice Department (R. 50, 82). The petition was granted by a decree entered February 18, 1948 (R. 85); and the Justice Department's motion for a stay was denied by order entered April 20, 1948 (R. 86); The Justice Department took no appeal; and forthwith complied by delivering the photostats. (For a more extended statement, see Point V, *post.*)

(4) On July 25, 1947, the defendants made a motion in the "Information Action (No. 6070)" to dismiss the Information or, in the alternative, for (R. 87):

"An order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents."

The grounds of the motion were the violations of the Fourth and Fifth Amendments, the Department's failure to appeal from any of the foregoing decisions of the District Court, and the consequent finality thereof in law as *res judicata* and finality in fact by compliance (R. 351-9). By opinion, dated April 14, 1948, the District Court denied the motion to dismiss the Information but granted the aforesaid alternative relief by way of preclusion (R. 91-95). Decree accordingly was entered April 20, 1948 (R. 95, 96). Once again, the Justice Department did not appeal. (For a more extended statement, see Point VI, *post.*)

(5) Thereafter, the Justice Department sought in the civil action to challenge the aforesaid decisions and to attempt to use the civil action as a medium for rearguing and, by indirection, for subjecting to appeal the decree of March 19, 1947, dismissing the indictment (No. 6055) and directing the return of the subpoenaed papers, the decree of February 18, 1948, directing the delivery of the photostats to the defendants, and the preclusion decree of April 20, 1948.

The appellant embodied this attempt in the following (R. 34-6, 46, 136-181):

1. Motion on April 14, 1948, in the civil action, to vacate the order of February 18, 1948, directing delivery of the photostats;
2. Motion on April 14, 1948, in the civil action, under Rule 34, for discovery of the original papers which had been photostated;
3. Motion on April 22, 1948, in the civil action for production of the photostats themselves;
4. New subpoenas *duces tecum*, dated May 12, 1948, in the civil action, requiring production at the trial of the civil action of the original papers which had been photostated.

The defendants moved to quash these civil subpoenas (R. 182-192).

All these motions by the Justice Department were denied and the civil subpoenas were quashed by the District Court on the ground, among others, that (R. 303):

"It seems to me that these motions are an attempt on the part of the Government to reargue in this civil action matters which have been decided in the criminal case and from which the Government did not appeal."

(For a more extended statement, see Point VIII, *post.*)

(6) At the hearing on April 20, 1948, the Justice Department's spokesman (Mr. Kelleher) requested the court to set a date for "trial", and said that, if the Department's aforesaid motions were denied (R. 197):

"we are prepared to announce to the Court that the Government is unable to proceed further in the trial of the case; that the Government has no evidence of any substantial amount on the basis of which it can go ahead with the trial; and we will, therefore, suggest to your Honor that you enter *judgment with prejudice against the Government* and from that judgment we shall appeal directly to the Supreme Court of the United States." (Italics ours.)

At the hearing on May 24, 1948, Mr. Kelleher modified this statement by saying that he might suggest a judgment "without prejudice" against the Government (R. 198). He also asked for a date for trial and said that he would assure defendants' counsel that, at the trial, "the Government does not intend to offer evidence" (R. 198. 203).

At the opening of the "trial" on June 2, 1948, Mr. Kelleher again repeated his assurance that the Justice Department was not asking for and would not conduct a "trial" "in the usual sense of the word" (R. 204).

Mr. Kelleher further said (R. 204).

"Mr. Kelleher: I think it will become clear as we proceed this afternoon that the defendants will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time."

This extraordinary "trial" then took the form of an "opening statement" by Mr. Kelleher and an accom-

panying affidavit by himself (R. 206-07, 229-32) in which, referring to other evidence not inhibited by the aforesaid prior decisions, he said (to quote the affidavit, R. 231):

"Furthermore, the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint, and, although conceivably such evidence might be obtained, that could only be done after an investigation co-extensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents."

Mr. Kelleher also called his associate (Mr. Karsted) as a "witness" (R. 210), and asked him whether, in the course of his participation in the investigation by the "Grand Jury", he had examined certain of the documents which were among those ordered by the court to be returned to the defendants (R. 210-13). The objections of defense counsel to this questioning were on numerous grounds and were sustained (R. 210-13).

Mr. Kelleher then announced that "the plaintiff rests" (R. 219); and defense counsel rejoined: "Your Honor, I cannot conceive what I am called upon to say or do" (R. 219). Thereupon Mr. Kelleher, having himself placed no evidence on the record, made the extraordinary request that the court "enter judgment for the plaintiff and the relief prayed for in the complaint" (R. 220).

Briefs were submitted; and, on August 6, 1948, the court made a decision in the very form which, at the hearing on May 24, 1948, Mr. Kelleher had suggested, to wit: a judgment without prejudice against the Government (R. 198).

The formal judgment, submitted by the Justice Department, was entered on September 3, 1948, adjudged as follows (R. 375-6):

"That the Government's request for judgment and relief prayed for in the complaint is denied and the action is dismissed without prejudice."

(For a more extended statement, see Point X, *post.*)

The Appellees' "Statement against Jurisdiction" and "Motion to Dismiss".

As already stated, the appellees filed with this Court at the outset a printed "Statement Making Against Jurisdiction" and a "Motion to Dismiss".

Also, as already stated, this Court has reserved decision thereon until "the hearing of the case on the merits" (R. 382).

Since the appellees' Statement and Motion and their Reply Memorandum are now before the Court, we shall not, in this brief, undertake to repeat.

We believe that the grounds both of the Objection to Jurisdiction and of the Motion to dismiss are sound.

The two cases relied on in the appellant's brief (pp. 24-6), to wit: *Wecker v. National Enameling Co.*, 204 U. S. 176, and *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774, have no bearing.

In the *Wecker* case, the complaint was dismissed "upon motion of the defendant" (p. 180). For this and other obvious reasons, the appellant's brief is plainly mistaken in asserting that this *Wecker* case "is inconsistent with the ruling in *Rudolph v. Sensener*, 39 App. D. C. 385", cited on page 14 of our "Statement against Jurisdiction and Motion to Dismiss".

In the *Bowles* case, the question of appealability was not considered in the opinion and apparently had not been raised. Moreover, the report does not show whether or not the dismissal was on motion of the defendant. Fur-

thermore, the Administrator introduced his other evidence, and conducted a real trial.

In the instant case, the plain fact is that, as the appellant's spokesman twice conceded (R. 203-4), the Justice Department, although admitting the existence of other evidence (R. 206-7, 231-2), was not undertaking to try the case "in the usual sense of the term" or to bring forward any real witnesses "or any other evidence" (R. 207). Avowedly, it was merely using the occasion for an altogether different and ulterior purpose (R. 102), namely: immediately to invite and obtain by a few gestures a quick dismissal without prejudice as an artificial means of attempting to subject to appeal final decrees in other and different proceedings from which it had taken no appeal (R. 102, 204, 207). —thus leaving itself with a second string to its bow, i.e. the right to bring a new suit on other evidence if it lost the projected "appeal".

POINT I

By choosing not to appeal from the final decision of March 19, 1947, dismissing the indictment, annulling "the grand jury investigation", and ordering return of the seized papers, the appellant made applicable as between it and these defendants the principles of *res judicata*, and concluded itself for all purposes and in all actions as to all issues of fact and law, explicit and implicit, embraced in that decision.

It announced to the Court below, and has announced to this Court, that it "accepted" that decision as "correct" and chose not to appeal.

A

This decision of March 19, 1947, was final and immediately appealable to this Court.

(1) The filing of the indictment on November 18, 1946 (R. 251) was promptly followed by the defendants' motions to dismiss the indictment and for the return of their seized papers (R. 72, 82, 83). The grounds of the motions were that the "special grand jury was not legally organized and that the indictment which it purported to find did not constitute due and constitutional process" (R. 89).

The Court's determination on both these motions was orally announced as its "decision" in open court on March 19th, 1947 (R. 56-70). It was based (R. 69) on *Ballard v. United States*, 329 U. S. 187, and *Zap v. United States*, 330 U. S. 300.

As to the dismissal of the indictment, the Court's closing judgment was (R. 70):

"The defendants' motions to dismiss are granted, and it becomes unnecessary for the Court to consider

other grounds alleged in the motions. The defendants are discharged and the bail is discharged."

As to the return of the documents, the Court's closing judgment was (R. 49, 307):

"The Court: There is no need of further discussion on this because the Court has already ruled the Grand Jury was illegally constituted. These papers were obtained as a result of subpoenas issued by an illegally constituted Grand Jury. Certainly defendants have a right to the return of their property under those circumstances. The motions for the return of the impounded documents are granted."

Both these rulings were corollary to the basic decision, to wit, the voiding of the "Special Grand Jury" and its "investigation" (R. 69, 70).

In a decision filed on February 6, 1948, granting the defendant's motion for delivery of the photostats, the District Court pointed out as follows some of the elements of its decision of March 19, 1947 (R. 84):

"It seems to me that when the grand jury turned out to be illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment."

(2) The decision on March 19, 1947, was in itself a final, complete and self-sufficient adjudication (R. 56, 70, 307). The fact that formal orders were entered was merely confirmatory (R. 70-5). The appellant could have immediately appealed direct to the Supreme Court of the United States (U. S. C. A. Title 18, § 682; Rule 12 of the Federal Rules of Criminal Procedure). Such appealability is conceded. (See next Subdivision.)

A motion to quash an indictment is a "plea" within the meaning of Title 18, §682, permitting a direct appeal to the Supreme Court of the United States from a judgment dismissing an indictment. (*United States v. Hark*, 320 U. S. 531, 535-6; re-hearing denied, 321 U. S. 802). By Rule 12 of the Criminal Rules, pleas in bar and similar pleas are replaced by motions to dismiss. A motion to dismiss an indictment for intentional and systematic exclusion of women from the grand jury, is proper under this Rule. (*Ballard v. United States*, 329 U. S. 187, 190; *Zap v. United States*, 330 U. S. 800.)

B

This appellant chose to "accept" as "correct" the decision of March 19, 1947; and to render it, as between these parties, conclusive in law by not appealing and conclusive in fact by compliance.

(1) The appellant deliberately chose not to exercise its admitted right to appeal. It has repeatedly averred as its reason that it believed the determination to be "*correct*".

Thus, in the hearing of April 20, 1948, Mr. Kelleher, special assistant to the Attorney General (R. 272), said (R. 102):

"Mr. Kelleher: We also *accepted* your Honor's ruling on the validity of the Grand Jury as *correct*. We abided by that. In the performance of our public duty we found that it was necessary for us to conclude that the District Court here was *not in error* and that, therefore, the Government should not appeal from that rule." (Italics ours.)

and again (R. 123-4):

"Mr. Kelleher: I have explained the reason we didn't appeal. . . . I have explained that, that the Government felt your Honor was right."

Indeed, the appellant's own "Statement as to Jurisdiction", signed by the Solicitor General and submitted to this Court in October, 1948, admitted (p. 3) that the plaintiff, "believing this decision correct," did not exercise its right to appeal. This admission is now repeated in its brief (p. 49).

This deliberate choice not to appeal is the more significant because the Court had informally urged the Government to appeal in order to obtain a final ruling from the United States Supreme Court on the questions involved (R. 48).

(2) The appellant has also conceded that the indictment was founded on these seized papers (R. 51, 361), and that embraced in its acceptance of the final decision of March 19, 1947 was that part of it which required the Justice Department to return the seized papers. To quote the appellant's brief (pp. 30, 31):

"The order releasing the documents from the impounding order was *ancillary* to the order dismissing the indictment. Since it merely directed the return of the original documents to the appellees, there was no reason for the Government to appeal from such order." (Italics ours.)

Thus, the appellant fully agrees with the statement of the District Court that the direction for the return of the papers was "ancillary to the dismissal of the indictment" and the invalidating of the "grand jury" (R. 108). — a decision which it formally has "accepted" as "correct" (R. 102, 123-4).

In the landmark case of *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, the Justice Department, precisely as in the present case, was ordered to return to the corporation the original documents unlawfully seized under color of grand jury subpoenas but endeavored to

retain its photostatic copies and thereafter to re-subpoena the originals for a new proceeding against the same corporation and officers. This Court held that the "return of the originals" in no way cured the original violation of the corporation's rights under the Fourth Amendment, and that the Justice Department could not keep the photostats, or re-obtain the originals, or use the evidence acquired therefrom, in any new proceeding or "at all." (pp. 391-2).

C

Hence, the conclusiveness of the decision of March 19, 1947, has, between these parties and as to all issues involved, the finality both of *res judicata* and of compliance by this appellant.

(1) As said by this Court (per Mr. Justice Frankfurter) in *Angel v. Bullington*, 330 U. S. 183, it is an elementary principle of *res judicata* that (p. 186).

"An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised."

There, in a suit begun in a court of North Carolina, the plaintiff had challenged a certain state statute as void under the Federal constitution. The Supreme Court of North Carolina, in dismissing the suit, disclaimed any intent to pass on any question of "substantive law". Nevertheless, the Supreme Court of the United States held that, notwithstanding this disclaimer, the constitutional question was necessarily involved and hence adjudicated; and that, when the plaintiff later began in the Federal Court in Virginia a new suit on the same claim against the same defendant, the decision of the North Carolina

Supreme Court must be accepted therein by all courts (including even the Supreme Court of the United States) as a conclusive adjudication between the parties of that constitutional question. This Court further said (p. 187):

“That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata*. *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 325.”

In *Southern Pacific Railroad v. United States*, 168 U. S. 1, the Court said (pp. 48, 49):

“The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.”

In *Frank v. Mangum*, 237 U. S. 309, this Court said of *res judicata* (p. 333):

“The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.” (Italics ours.)

In *United States v. Oppenheimer*, 242 U. S. 85, this Court upheld, as governed by *res judicata*, a motion to quash an indictment because of a prior adjudication that a former indictment for the same offense was barred by the Statute of Limitations. This Court said (p. 87):

"A plea of the statute of limitations is a plea to the merits, *United States v. Barber*, 219 U. S. 72, 78, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution."

(2) The doctrine of *res judicata* is equally applicable in and to all actions whether the first final determination is in a criminal or in a civil action. (See Point VII, *post*.)

D

Thus, under the decision of March 19, 1947, it is the law of this case that, as regards these defendants, the "Special Grand Jury" had no status or authority, that its so-called "investigation" was invalid, and that its compulsory seizure, search and use of the defendants' papers were a violation of the Fourth Amendment.

Judge Hartigan's decision of March 19, 1947, concluded with the following statement of its *ratio decidendi* (R. 70):

"It, therefore, seems that in the interest of justice this Court, in view of the *Ballard* and *Zap* cases, is in duty bound to grant the motions of the defendants in these cases."

In the hearing of September 8, 1947, on the defendants' motion for the delivery of the photostats, the appellant's counsel argued that, although "the Grand Jury" was invalid, its subpoena was valid because "the process is the court's process" (R. 329). To this argument Judge Hartigan replied (R. 329):

"The Court: Assuming for a moment it is a legal subpoena of the Court, has the Court a right to order somebody to go before an illegal body and produce the papers mentioned in that subpoena?"

Mr. Kelleher: My point is this: The Court has the right to order the investigation in this instance. There is no question about this Court's right to order an investigation of these companies to determine whether there had been a violation of the Sherman Act.

The Court: Investigation by whom?

Mr. Kelleher: A Grand Jury.

The Court: What kind of a Grand Jury.

Mr. Kelleher: A lawful Grand Jury.

The Court: This wasn't a lawful Grand Jury."

And later, at the same hearing, there was the following colloquy between appellant's counsel and the Court (R. 334):

"Mr. Kelleher: My position is this Court had the power to order the production of those documents for a Grand Jury investigation.

The Court: An illegal Grand Jury? This Court hasn't any right to subpoena documents except for some proper purposes. The proper purpose there was for a legal Grand Jury but it turned out to be—"

In his decision of February 6, 1948, granting the defendants' motion for the delivery of the photostats, Judge Hartigan said (R. 84):

"It seems to me that when the grand jury turned out ~~to be~~ illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment."

In the argument of appellant's counsel on April 20, 1948, in support of his motion to stay the court's decree for the delivery of the photostats, he asked for a stay until

certain possible procedure on his part in this civil action. In denying the stay, Judge Hartigan said (R. 109):

"The argument, it seems to the Court, is in effect asking the Court to do something that the Court has already indicated *is in violation of the constitutional rights of the defendants here, and I refer to the opinions which are on file in the case.* . . .

The Court has already ruled, as I have stated, that in its opinion *the constitutional rights of the defendants have been violated* and it has issued orders for the return of not only the original documents involved in these cases, but also the photostats of the said original documents." (Italics ours.)

E

The basic formulation in the appellant's brief flatly contradicts its previous concessions and assertions and the conclusiveness which it itself gave to the final decision of March 19, 1947.

(1) As to the "Special Grand Jury", the appellant's brief now rests itself on this opening and extraordinary major premise in its Point III (p. 36):

"The grand jury had more than *de facto* existence, and its proceedings had legal validity."

This major premise is in complete contradiction of the appellant's spokesmen in the District Court. They had no hesitancy in declaring the grand jury "illegal", "unlawful", and "invalid", and in declaring the concurrence of the Department of Justice in the decision of the District Court to that very effect (R. 102, 103, 120, 123-4, 305, 322-3).

We are not enlightened, anywhere in the appellant's brief as to what meaning lies behind these studiously indefinite words: "The grand jury had more than *de facto* existence."

As early as the hearing of March 19, 1947, in response to the Court's statement that the papers were gotten from the defendants "as a result of an illegal process", Mr. Karsted, Special Attorney for the United States (R. 294), replied: "*That is right, your Honor*" (R. 305). (Italics ours.)

In the hearing on April 20, 1948, his associate, Mr. Kelleher, referred to the subpoenas as "issued on behalf of the illegal Grand Jury" (R. 103). In the hearing on September 8, 1947, Mr. Kelleher twice spoke of "the unlawfulness of the Grand Jury" (R. 322, 323).

Moreover, inherent in the appellant's concessions that the decision of March 19, 1947, was "correct," is recognition of the illegality of the "Grand Jury" and its so-called "Investigation."

If, as is now suddenly and surprisingly asserted (appellant's brief, p. 36), "its (the "grand jury's") proceedings had legal validity", why did the spokesmen of the Justice Department assure the court below, as late as April 20, 1948, that the Department "*accepted your Honor's ruling on the validity of the Grand Jury as correct*"? (R. 97, 102.)

For applicable judicial decisions, see Point IV, *post*.

POINT II

Moreover, quite aside from the acceptance and conclusiveness of the decision of March 19, 1947, the "Special Grand Jury" was a nullity as a matter of law.

Since, as against the accused (these defendants), the "Special Grand Jury" was without authority in law, its purported process and proceeding, whether by its indictment of them or by its seizure, search and use of their papers, were without authority in law, and also:

- (a) were not a process and proceeding "of a Grand Jury" under the Fifth Amendment;
- (b) were not "due process of law" under the Fifth Amendment; and
- (c) were "unreasonable" under the Fourth Amendment.

A

The fallacy that the "search was a valid search."

In development of its present major premise (quoted in full in subdivision E of Point I, *supra*) that the "Special Grand Jury's" "proceedings had legal validity" (pp. 35, 36), the appellant's brief next says (p. 38):

"The subpoenas by which the documents involved in this case were produced before the Grand Jury were, therefore, valid legal process, and the production of documents pursuant thereto, if it was a search, was a valid search."

We have already challenged the major premise, and we now challenge this development of it.

(1) The appellant's reasoning has this obvious fallacy: It concedes that the "Special Grand Jury" was without authority in law to indict the defendants, but it claims that that illegal body nevertheless had authority in law to seize, search and use their papers for the purpose of indicting them.

In other words, it could not lawfully indict, but it could lawfully sit to indict! It had no lawful power to accomplish the sole objective for which it was called by the Department of Justice (R. 43), but it could lawfully try so to do! It could not lawfully accuse the defendants of criminality, but it could rifle the defendants' private papers to see and find if they were criminals!

The Department of Justice, so its brief now runs, could not lawfully ask this body to accuse the defendants, but it could use this body to compel the submission to itself of evidence for its own accusation of the defendants criminally and civilly!

All this, we submit, is, as pointed out by the court below (R. 84, 85), analogous to the fallacy condemned by this Court in *Johnson v. United States*, 333 U. S. 10, 16, to wit: The Department justifies the seizure and search by the objective of indicting and at the same time justifies the objective of indicting by the alleged results of the seizure and search. As this Court said in the *Johnson* case (p. 16, *supra*):

"Thus the Government is obliged to justify the arrest by search and at the same time to justify the search by the arrest. *This will not do.*" (Italics ours.)

(2) The subpoenas *duces tecum* were solely for the "Special Grand Jury." They were entitled: "*In Re Special Grand Jury Proceedings.*" Their body, as read into the Record by Mr. Tuttle, was (R. 83, 314)*:

* The full text of the body of the subpoenas appears on page 21 of our printed "Statement Against Jurisdiction and Motion to Dismiss" now before this Court.

"YOU ARE HEREBY COMMANDED to appear before the Special Grand Jury of the District Court of the United States for the District of Rhode Island * * * and that you bring with you and produce at the time and place aforesaid"—to wit, before the Special Grand Jury—these "papers * * *" and to testify concerning certain matters under investigation by the Special Grand Jury * * *"

Obviously, these subpoenas were issued solely for the purposes of the Grand Jury and the "investigation" by it, at the instigation of the Department of Justice, into "the chlorinating equipment manufacturing industry", including these defendants (R. 38, 43, 83). There was no other purpose or authority for their issuance. There was no other body to or for whom the compulsory production was to be made, or the power of search and use given. No action, civil or criminal, was pending.

The "investigation" by the Grand Jury was an independent inquiry and was docketed as "Misc. No. 5301."* It was secret, *ex parte*, and solely to enable "the grand jury" to determine whether an indictment should be voted.

Judge Hartigan would have had no authority to subpoena any papers for investigation by himself (*In re Pacific Telephone and Telegraph Co.*, 38 Fed. 2nd 833, 836), and never purported to do so. These subpoenas were not issued at his instigation. As he said in the course of the argument on March 19, 1947, upon the defendants' motion for the dismissal of the indictment and for the return of the subpoenaed papers (R. 306):

"The Court. All of these documents were obtained as a result of subpoenas issued at the instance of the Grand Jury, which we have held to be an invalid Grand Jury."

* See page 20 of our printed "Statement Against Jurisdiction and Motion to Dismiss" now before this Court.

And, at another point (R. 315), Judge Hartigan referred to the papers as brought up at the instigation of the Grand Jury.

"For its purpose and for inspection by the Department of Justice as the agents of the Grand Jury designated by the Grand Jury for the purpose."

At the hearing on April 20, 1948, on the appellant's motion to stay the order for the delivery of the photostats to the defendant, the appellant's counsel (Mr. Kelleher) referred to the documents as obtained "by reason of the subpoenas issued on behalf of the illegal Grand Jury"; and his associate (Mr. Karstedt), in an affidavit verified April 14, 1948, referred to the documents as "produced by these companies in response to Grand Jury subpoenas *duces tecum*" (R. 38).

In short, these subpoenas were typical Grand Jury subpoenas issued in a Grand Jury proceeding described as a Grand Jury "investigation", at the instance of the Grand Jury, and calling for production before the Grand Jury.

(3) The law is well settled that grand jury subpoenas *duces tecum* constitute compulsory production and seizure, followed in the nature of things by search and use, of property and papers.

The law is also well settled that, if such compulsory production is for, and such resultant seizure, search and use are by, a purported grand jury having no authority in law, or by representatives of the Department of Justice in aid of such an illegal body, the Fourth and Fifth Amendments have been violated and the property "so secured may be regained".

As said in *Weeks v. United States*, 232 U. S. 383, 397:

"While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection."

In *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, the opinion of this Court has the following footnote at page 202:

"In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of the power." Lasson, Development of the Fourth Amendment to the United States Constitution, 137, citing *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Halé v. Henkel*, 201 U. S. 43, 76. Cf. *Boyd v. United States*, 116 U. S. at 634-635 (as to which see also notes 33 and 36: " * * * we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited * * * is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment. ")

In *Feldman v. United States*, 322 U. S. 487, this Court said (per Mr. Justice Frankfurter) (p. 492):

"When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, *Go-Bart Co. v. United States*, 282

U. S. 344, and its admission, after timely motion for its suppression, vitiates a conviction. *Byars v. United States*, 273 U. S. 28."

(4) This language is peculiarly applicable to the present case because it is obvious that the representatives of the Department of Justice were the operators of the subpoenas *duces tecum*.

Indeed, they have admitted that it was they who also conducted the "organization and arrangement" of the seized papers so that they could be "intelligently understood and evaluated by the Grand Jury" (R. 315).

In *Go-Bart Co. v. United States*, 282 U. S. 344, this Court said (p. 357):

"It (the Fourth Amendment) is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent."

Obviously, a seizure and search which is unlawful, or by or for a body not authorized, or by the Department of Justice as the agent of such body, is *per se* "unreasonable" within the meaning of the Fourth Amendment.

In consequence, this Court has interpreted the Fourth Amendment as operative against the indirect, as well as the direct, use of evidence obtained in violation thereof. To quote from *Goldstein v. United States*, 316 U. S. 114, 120:

"It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection. This, for the reason that otherwise the policy and purpose of the amendment might be thwarted. And we have further held that the policy

underlying the amendment cannot be circumvented by the indirect use against the victim of evidence so obtained."

B

The fallacy of disregarding the Fifth Amendment.

Furthermore, it is obvious that the purported process and proceeding by a "grand jury" acting without authority in law, whether by indictment or by seizure and search of papers, are not "due process of law", and do not constitute a proceeding "of a Grand Jury" within the meaning of the Fifth Amendment,—quite aside from being "unreasonable" and illegal under the Fourth Amendment.

The relation in this field between the Fourth and Fifth Amendments has been pointed out as follows by this Court (per Mr. Justice Frankfurter) in *Feldman v. United States*, 322 U. S. 487, 489:

"We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy."

And in *Zap v. United States*, 328 U. S. 624, this Court said (per Mr. Justice Douglas) (p. 628):

"As we pointed out in *Paris v. United States*, ante, p. 582, the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments."

And, as said in *Hall v. United States*, 168 F. 2d 161 (C. A. D. C.) (p. 164):

"The due process clause of the Fifth Amendment would be invokable if the authorities charged with the duty of selecting jurors had systematically excluded Negroes from the panel."

It is obvious that a body, having no lawful power to indict anyone, can have no lawful power to conduct an "investigation" for the purpose of determining whether it should find an indictment, —and, a *fortiori*, no lawful power to compel submission of private books and papers for search and use in aid of such an "investigation" and of a possible indictment of their owners.

Since an indictment by such a body is not and cannot be "due process of law" and must be annulled upon timely challenge by the accused (as was done in this case, R. 84), the proceeding of such body toward such an indictment is equally void of "due process" as against the accused; and also such body cannot be the duly constituted and authorized grand jury required by the Fifth Amendment.

If the "grand jury" has no lawful authority to indict, it has no lawful authority to sit to indict.

When timely and competent challenge is made, there can be, as against the party in jeopardy, no dividing line between legal and illegal action by an illegal "grand jury". The status of illegality is then *ab initio*. It excludes "a strange interlude" of legality.

C

The fallacy that "the Government had a Right to See."

A further fallacy in the appellant's brief is illustrated by its own sub-heading on page 39:

"B. The Production of Documents Which the Government Had a Right to See Pursuant to Subpoena Reasonable in Scope Was Not a Search Within the Meaning of the Fourth Amendment."

We do not know to whom or to what the appellant thus refers as "the Government". In the administration of justice in the courts the Justice Department is not "the Government". It is merely the attorney for a party

before the judicial branch of the United States Government.

Furthermore, the Justice Department, if by the sub-heading it is referring to itself, had no "right" whatever to "see" any documents except as an agent for a lawfully constituted and constitutional grand jury. The Justice Department has no "right" to subpoena documents for production before and inspection by itself; and, *ex officio*, it has no right to enter private premises and "see" private papers.

Nor has a "grand jury" any such compulsory right to "see", unless it is a body lawfully constituted and authorized to act as a constitutional grand jury.

D

The fallacy as to "the castle wall."

The appellant's brief (pp. 18; 40) attempts to draw some distinction between what it calls "an actual search and seizure" on the one hand, and a "figurative or constructive" search on the other.

But once again the appellant can find no escape by resort to a form of words. We are dealing here with substantive rights, with the two constitutional guaranties which are the most basic in our whole free society, and with a vast area of civil liberties which cannot be wiped out by a mist of words.

The appellant's argument proceeds as if, in case of a subpoena *duces tecum*, all there were to a citizen's constitutional rights is the question whether the subpoena was "reasonable in scope". It overlooks that both the Fourth and Fifth Amendments require, not only that it shall be reasonable in scope but also that it shall proceed from lawful authority and with the lawful purpose of putting the papers into hands lawfully authorized to search, use and retain them.

The case of *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 202, cited at page 40 of the appellant's brief, intimates in no way that merely because a purported subpoena *duces tecum* is "reasonable in scope" that, therefore, it is fully constitutional and merely a "figurative or constructive" search.

That decision expressly declares that, under the Fourth Amendment, the subpoena must not only be sufficiently definite, reasonable in scope, and relate to relevant matters, but also be "*one the demanding agency is authorized by law to make*" (p. 208).

Premises can be entered and private papers taken and subjected to search even more effectively by purported compulsory process and the coercion of color of authority than by force of arms. To imply, as does the appellant's brief (p. 41), that the Fourth and Fifth Amendments are applicable only when a "*castle wall is breached*", is to open in the castle wall with which the Constitution surrounds the most sacred private rights and liberties a massive breach for the entrance of the police state.

The ramparts of personal liberty are not stones and mortar.

In *Gould v. United States*, 255 U. S. 298, this Court said, concerning the central importance of the Fourth and Fifth Amendments (p. 303):

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U. S. 616, in *Weeks v. United States*, 232 U. S. 383, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments."

E

The fallacy in the proposed restriction upon the Fourth Amendment.

The appellant's brief attempts to restrict the Fourth Amendment to what it calls and interprets narrowly "the right of privacy" (p. 41).

There is no such restriction. The Amendment is for the protection of the whole American concept of personal security and liberty.

As said in *Harris v. United States*, 331 U. S. 145 (*per* Chief Justice Vinson) (p. 150):

"This Court has consistently asserted that the rights of privacy and *personal security* protected by the Fourth Amendment * * * are to be regarded as of the very essence of constitutional *liberty*; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen * * *." *Gouled v. United States*, 255 U. S. 298, 304 (1921)." (Italics ours.)

F

The fallacy of indirection in avoidance of the Fourth and Fifth Amendments.

The appellant's argument comes down to the defense of *indirection* in avoidance of the illegality of *direction*.

Our constitutional guarantees are too rugged and too precious to admit of such circumvention.

In *Nardone v. United States*, 308 U. S. 338, this Court said (*per* Mr. Justice Frankfurter) (p. 340):

"To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'incon-

sistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See *Gouled v. United States*, 255 U. S. 298, 307."

Indeed, in a criminal case, evidence obtained in violation of "civilized standards of procedure and evidence", will be suppressed even if not outlawed by express constitutional prohibition. (*McNabb v. United States*, 318 U. S. 332, 340-1; *Nardone v. United States*, 308 U. S. 338, 342.)

G

The analogy from search warrants.

An eloquent and pertinent analogy is furnished by cases of search warrants which have been actually issued by a magistrate and executed by an officer of the law, but where the proof submitted to the magistrate did not establish probable cause or was not sufficiently definite.

In such case, notwithstanding that the magistrate was *de jure* and personally authenticated the warrant with his own hand and seal, the party aggrieved may secure the judicial annulment of the warrant, the return of the property and papers seized, and the suppression and exclusion of any evidence derived therefrom, notwithstanding "that the search was successful in revealing evidence of a violation of a federal statute".

Byars v. United States, 273 U. S. 28, 29, and cases there cited;

Weeks v. United States, 232 U. S. 383, 397;

Woods v. United States, 279 Fed. 706, 710;

Freeman v. United States, 160 F. 2d 72, 74.

POINT III

As against an accused's timely challenge, an exclusory jury is no jury at all.

It is barred from status and authority by the Fifth and Sixth Amendments, and, if a state jury, by the Fourteenth Amendment.

This is true whether the exclusion is by reason of race, creed, sex, economic status or employment.

The constitutional right to an impartial jury and to due process of law implies a jury which is "truly representative of the community." An exclusory jury is, as against the timely challenge of an accused, not *de facto*, but constitutionally without status at all.

This constitutional principle was first authoritatively formulated by this Court (per Mr. Justice Black) in *Smith v. Texas*, 311 U. S. 128, 130, 132:

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. * * * *If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.*" (Italics ours.)

While this *Smith* case arose under the Fourteenth Amendment, the next case wherein this Court (per Mr. Justice Murphy) reaffirmed this principle (*Glasser v. United States*, 315 U. S. 60) arose under "the Fifth and Sixth Amendments" (p. 84). It involved an alleged systematic

exclusion of all women (not members of the League of Women Voters) from service on federal juries, notwithstanding that in Illinois all women were legally eligible for jury service. The conviction was affirmed on the ground that the alleged exclusion was not sufficiently proved; but this Court said that under the Fifth and Sixth Amendments not only has trial by jury become a "fundamental" constitutional right "in criminal proceedings in a federal court" (p. 84), but also that, implicit in this constitutional right, are "*our notions of what a proper jury is*" (p. 85). This Court described this "notion" as having "become inextricably entwined with the idea of a jury trial" and hence with the constitutional guarantee of an "impartial jury" and, we add, consequentially with the constitutional guarantee of due process.

Inherent in this constitutional "notion" as to "a proper jury" is, to quote further from the *Glasser* case (pp. 85, 86):

"the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. * * * Tendencies, no matter how slight, toward the selection of juries by any method other than a process that will insure a trial by a representative group are undermining processes weakening the institution of jury trial and should be sturdily resisted."

Since those decisions, this Court has steadily continued to identify the Constitution's concept of "a proper jury" as "a body truly representative of the community" with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions",—that is, with the substance and essence of due process of law.

Thus, in *Thiel v. Southern Pacific*, 328 U. S. 217, where there was revealed in a civil case in a federal court a syste-

matic exclusion of "persons who work for a daily wage"; this Court (per Mr. Justice Murphy) said (p. 220):

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

In *Ballard v. United States*, 329 U. S. 187, there was in California systematic exclusion of women from federal grand and petit juries, notwithstanding their eligibility for state juries. This Court (per Mr. Justice Douglas) sustained the claim of the convicted defendants that such exclusion violated the Fifth and Sixth Amendments, and not only reversed the conviction *but dismissed the indictment* since "the grand jury was likewise drawn from a panel improperly chosen" (p. 196).

This Court cited and quoted from the above decisions, and also expressly approved (p. 194) the dissenting opinion of Judge Denman in the court below. In that dissenting opinion, Judge Denman had said (152 F. [2d] 941, 950, 951):

"It is a matter of indifference whether this claim is based upon the Fifth or Sixth Amendments. It is obvious that they have been denied due process in the jury-constituting portion of the prosecuting process if the lists are not valid under the requirements of the Sixth Amendment."

Judge Denman then quoted the above passage from the *Glasser* case, and continued (p. 951):

“This statement of the law was made in considering whether the Sixth Amendment was violated by the omission of all women from the grand jury and nearly all women from the trial jury lists. It is inconceivable that the Supreme Court was speaking in vacuo. *To me the Glasser statement makes clear that today the ‘impartial jury’ of the Sixth Amendment has as one of its determinants the character of the grand and trial jury lists as ‘truly representative of the community’ with respect to the exclusion therefrom of qualified women.*” (Italics in this paragraph ours.)

In *Zap v. United States*, 328 U. S. 624, this Court had affirmed a decision of the Circuit Court of Appeals (151 F. 2d 100), which in turn had affirmed a conviction in a federal court in California. A petition for rehearing was denied by this Court (329 U. S. 824). Nevertheless, later, the defendant filed a second petition for rehearing, citing not only the *Glasser* and *Thiel* cases, but also the *Ballard* case, then just decided. Despite the fact that the conviction had been affirmed by this Court, this Court granted (330 U. S. 800) this second petition for rehearing, reversed the judgment of the Circuit Court of Appeals, and *dismissed the indictment*, citing *Ballard v. United States*, 329 U. S. 187. An examination of the record on appeal shows that the defendant had claimed at the trial that the systematic exclusion of women from the federal grand jury had violated his constitutional rights.

These cases demonstrate, beyond all dispute, that, under the Constitution, an exclusory jury is no jury at all.

POINT IV

Under the Constitution, the law cannot recognize, as between the Government and a person in jeopardy under the law, such an authority as "a *de facto* Grand Jury".

(1) As already stated (Point I, subd. E, *supra*) the appellant's brief now advances as its major premise (p. 36) that:

"The grand jury had more than *de facto* existence, and its proceedings had legal validity."

Also, as already stated (Point I, subd. E, *supra*), this major premise is in complete contradiction of the appellant's spokesmen in the District Court. And also, as shown in Points I, II and III, *supra*, it clearly contradicts the law of the case as settled *res judicata* between these parties by the unappealed decision of March 19, 1947, and also by fundamental principles of law.

No more far-reaching and devastating blow could be struck against the constitutional safeguards protecting the citizen against governmental powers to indict for crime and to secure seizures and searches of private papers for the purpose of his or its indictment, than to uphold the Department of Justice in its present claim that the one body in which the Constitution reposes the authority to indict need not be *de jure* as a condition of the lawful exercise of such powers and of "the right to see" the citizen's papers (appellant's brief, pp. 36, 39).

(2) No decision has been cited upholding these major premises of the appellant's brief. The decisions are the very opposite.

Under the Fifth Amendment, a grand jury is a constitutional body constituting in law *the essential and exclusive authority for a valid indictment.*

As said by Chief Justice Marshall in *United States v. Hill* (Fed. Cas. No. 15,364, 1 Brock 156):

"This (criminal) jurisdiction they (Federal Courts) are bound to exercise, and it can *only* be exercised, through the instrumentality of grand juries." (Italics ours.)

And as said by this Court (*per* Mr. Justice Frankfurter) in *Cobbledick v. United States*, 309 U. S. 323, 327:

"The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. . . . The proceeding before a grand jury constitutes 'a judicial inquiry', *Hale v. Henkel*, 201 U. S. 43, 66, of the most ancient lineage. See *Wilson v. United States*, 221 U. S. 361."

And as also said in the early case of *Ex parte Farley*, 40 Fed. 66 (p. 71):

"It (the Fifth Amendment) meant a grand jury which was a legal body, —one impanelled by a court which had legal authority to so impanel it."

(3) Moreover, a grand jury is "a creature of statute". No group can acquire or be given legal status as a grand jury except when called into being and endowed with authority in compliance with the statute.

As said in *In re Mills*, 135 U. S. 263, 267:

"A grand jury, by which presentments or indictments may be made for offences against the United States, is a creature of statute. It cannot be em-

panelled by a court of the United States by virtue simply of its organization as a judicial tribunal."

(4) Hence, both because of the explicit and implicit provisions of the Fifth Amendment and of the statute and rules of law governing the constituting of a real grand jury, there can be in law, as against timely challenge by an accused, no such authority as a *de facto* grand jury.

Any one may waive his constitutional rights: But, when he makes timely assertion of them (as held without question in this case, R. 84), the criminal law's processes against him must be *de jure*. That is the essence of government *by law*, and of liberty *under law*. It is the difference between the free society and the police state.

In *United States v. Johnson*, 123 F. 2d 111 (reversed on other grounds, 319 U. S. 503), the Circuit Court of Appeals for the Seventh Circuit said (p. 120):

"In defense of the Grand Jury proceeding, the Government relies upon a decision of this Court, *Elwell v. United States*, 7 Cir., 275 F. 775. While it does not expressly so contend, we assume it infers, by reason of what was said in that case, that the Grand Jury may be considered as *de facto*. While we are loath to repudiate a holding of our own court, *we are of the view that there is no such thing as a de facto Grand Jury in a Federal Court*. In the *Elwell* case, the court cites *People v. McCauley*, 256 Ill. 504, 509; 100 N. E. 182, which, it is true, recognizes such a Grand Jury. The latter court expressly points out, however, that a Circuit Court of Illinois has general and original criminal jurisdiction, with common law power to call or continue a Grand Jury. Its authority is not dependent upon Statute. A United States District Court, on the contrary, is of limited jurisdiction with such powers only as are expressly conferred. A Grand

Jury is 'a creature of statute.' *In re Mills, Petitioner, supra.*" (Italics ours.)

And later in its opinion the Circuit Court of Appeals said (p. 128):

"In our study of the record and in preparing the opinion, we have endeavored to keep in mind a basic concept of American jurisprudence which, from time immemorial, has taught that *every person charged with crime, regardless of his occupation or station in life, is entitled to a fair and impartial trial upon the issue or issues tendered by a legal indictment, returned by a Grand Jury empowered to act.*" (Italics ours.)

In *United States v. McKay*, 45 F. Supp. 1007, the court said (p. 1015):

"There is no such thing as a *de facto* grand jury in a Federal Court."

* In *Wilson v. United States*, 221 U. S. 361, this Court said (*per Mr. Justice Hughes*) (p. 382):

"Although the object of the (grand jury) inquiry may be to detect the abuses it (the corporation) has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers *to duly constituted authority when demand is suitably made.*" (Italics ours.)

(5) All these decisions add up to the elementary principle of constitutional liberty and limitation of governmental power that officials or bodies proceeding under the criminal law, must have *de jure* authority for themselves and for their procedure if there be timely challenge.

Otherwise, as said by this Court (*per Mr. Justice Jackson*) in *Johnson v. United States*, 333 U. S. 10, 17:

"Any other rule * * * would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law."

(6) The appellant's brief cites (p. 37) and quotes from *United States v. Gale*, 109 U. S. 65.

But this case has no conceivable bearing. There the defendant, without protest against the grand jury, went to trial and was convicted. All that the Court held was that he could not thereafter and for the first time move in arrest of judgment on the ground that, in impanelling the grand jury, which had found the indictment, four persons were excluded from the panel under a statute making ineligible those who had taken part in the Rebellion. The defendant claimed that such statute was unconstitutional. All that the Court held was (pp. 67, 73):

"Inasmuch as, by pleading not guilty to the indictment, and going to trial without making any objection to the mode of selecting the grand jury, such objection was *waived*. The defendants should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity, or did not see fit, to challenge the array." (Italics ours.)

But the Court was careful to add that even the doctrine of waiver could not be applied "where the proceeding is *wholly void* by reason of some fundamental defect or vice therein" (i.e. the empanelling of the grand jury) (p. 72).

In the present case, the defendants, instead of waiving their rights, promptly asserted them by a concededly "timely" motion to quash the indictment (R. 84), which concededly was correctly granted (Point I, subd. B, *supra*).

(7) In the same connection the appellant's brief (p. 37) cites *Kaizo v. Henry*, 211 U. S. 146; *Redmon v. Squier*, 162 F. 2d 195, 196; and *Kelly v. Squier*, 166 F. 2d 731.

The *Kaizo* case is without any conceivable bearing. There the defendant was indicted in the Circuit Court of Hawaii for murder. He filed a plea in abatement on the ground that certain members of the indicting grand jury were not citizens of the United States because, as he claimed, their naturalizations were defective. The Circuit Court tried and overruled this plea. Thereafter, the defendant was convicted, and the conviction was affirmed by the Supreme Court of the Territory of Hawaii. Six days before his execution, he filed a petition in the Supreme Court of the Territory for *habeas corpus*, claiming that his plea in abatement had been wrongfully overruled. On these facts the Supreme Court of the United States held that the defendant could not use the writ of *habeas corpus* as a collateral attack upon the final judgment of conviction or as a means of rearguing points of fact and law duly tried and decided in that action (p. 149).

The *Redmon* and *Kelly* cases, *supra*, also cited by the appellant (p. 37), were merely instances where, after conviction, the defendant attempted, by *habeas corpus*, for the first time to raise a claim that there had been a defect in the impanelling of the grand jury.

(8) The appellant's brief also cites (p. 38) *Blair v. United States*, 250 U. S. 273, 282, for the claim that "a witness" called before a grand jury "has no standing to challenge its composition."

That case also has no conceivable bearing; and, incidentally, it holds no such thing.

There the appellants had been adjudged guilty of contempt in refusing to answer certain questions before a federal grand jury. Each of the appellants were before the grand jury merely as "witnesses" and had been explicitly informed by the grand jury, through its spokesman

the United States Attorney, "that the inquiry was not directed against him" (p. 277). Nevertheless, they refused to answer on the ground that a federal grand jury in New York had no authority to inquire into the conduct of a campaign committee for the primary election of a United States Senator in Michigan (p. 277). *The composition or legality of the grand jury as such, was in no way challenged.* All that was held was that the witness could not refuse to answer on the alleged ground that the grand jury was inquiring into a matter beyond jurisdiction in New York. As this Court said (p. 282):

"He (the witness) is not entitled to set limits to the investigation that the grand jury may conduct."

Here the issue is not as to the lawful limits of an investigation by a lawful grand jury but as to the authority of the body (under the Fifth Amendment and the law) to sit as a grand jury at all.

The case of *Fairfield v. United States*, 146 Fed. 508, also cited in the appellant's brief (p. 38), merely illustrates how far afield appellant's counsel is compelled to go. That case only held that in the trial of an equity action a subpoenaed witness has no standing to refuse to testify on the alleged ground that the complaint stated no case.

POINT V

Likewise, by failure to appeal and by compliance, the appellant rendered conclusive and *res judicata* the decree of February 18, 1948, directing delivery to the defendants of the photostatic copies made by the Justice Department of some of the seized and searched papers.

Moreover, that decree was right in law.

1. The indictment was dismissed and the subpoenaed papers ordered returned by final "decision" on March 19, 1947 (R. 56-70). Confirmatory orders were promptly entered (R. 70, 75). Thereby the so-called "Criminal Action No. 6055" forthwith terminated.

As already stated, the appellant regarded the decision as "correct", took no appeal, and immediately complied. (See Point I; subd. A, *supra*.)

Likewise, "the Special Grand Jury" necessarily ceased to exist the moment the decision of March 19, 1947, was rendered. Its so-called "investigation" in and for which the defendants' papers had been seized, impounded and searched by that body and by the Justice Department as its agent, also then came to a permanent end.

On April 7, 1947, and again on May 2, 1947, the defendants demanded of the Department of Justice the delivery to them of the photostatic copies made by the Department of some 8,000 of the 200,000 papers subpoenaed and impounded as aforesaid (R. 36, 44, 50, 230). Some of the papers so photostated had been put in evidence before the "Special Grand Jury" (R. 230). A third demand, in writing, was made on May 5, 1947 (R. 79, 80). These demands were not honored (R. 50).

Thereupon, on May 9, 1947, the defendants petitioned the Court for an order for the delivery of the photostats to them.

This petition for the delivery of these photostatic copies was, in terms and of necessity, *an independent and separate proceeding*, with a new and separate docket number. It was entitled (R. 75, 76):

"DISTRICT COURT OF THE UNITED STATES

DISTRICT OF RHODE ISLAND

"In the Matter

of

Misc. No. 5347

Motion of Wallace & Tiernan
Company, Inc., et al., for re-
turn of documents."

The petition was supported by affidavit of defendants counsel, similarly entitled (R. 77). No counter-affidavit or other opposing proof was filed by the Department of Justice (R. 50, 82).

On September 8, 1947, in opening the hearing on this petition, the defendants' counsel said (R. 309):

"First of all, we have in Miscellaneous No. 5347, *which is a separate proceeding*, a motion for return of certain photostatic copies of documents which are in the possession of the United States." (Italics ours.)

2. The appellant's brief, as we read it, *concedes* that the United States could have taken an appeal from this final decree in this separate and special proceeding (p. 32): and also concedes that the "reasoning" in the court's

*The like petition by the defendants Builders Iron Foundry and Chafee was filed at a somewhat later date.

opinion preceding that decree "would have supported an order of preclusion" and "gave forewarning that it would rule adversely to the Government when the issue (of preclusion) was directly involved." (p. 32).

The excuse for not appealing is altogether unrealistic in view of this admitted "forewarning" by the court; and certainly cannot now be given, even the color of substance by a present belated speculation (p. 32) that on such appeal the appellees might have taken the position that the Government would not be prevented by the decree "from obtaining the documents by valid process." The motion for the delivery of the photostats and the motion to preclude were argued on *the same day* (September 8, 1947, R. 308-9); and the motion to preclude was decided on April 14, 1948 (R. 91),—to wit: before the expiration of the Government's time to appeal from the order as to the photostats entered February 18, 1948 (R. 85) (Section 2107, Title 28, U. S. C.). Furthermore, this very order as to the photostats was itself amended on April 20, 1948 (R. 86), which was *after* the decision of the preclusion order (R. 91).

Indeed, at the very time when the motions for the photostats and to preclude were simultaneously argued on September 8, 1947 (R. 308-9), the Justice Department's spokesman (Mr. Kelleher) expressly conceded that both motions rested upon and were controlled by the decision in the *Silverthorne* case that the wrongly-obtained evidence could not "be used at all", if the court held (as it thereupon did, R. 84) that "there has been an unreasonable search and seizure within the meaning of the Fourth Amendment" (R. 323, 360-1). In that same argument, defendants' counsel expressly stated that he was claiming that complete preclusion was the consequence of both motions (R. 351); and Mr. Kelleher's brief submitted on these motions conceded that in logic preclusion was the consequence of both (R. 351).

Hence, the speculation offered in the appellant's brief (p. 32) as an excuse for not appealing is purely fictional.

(3) But, quite aside from the appellant's concession, the final decree for the delivery of the photostats was clearly appealable by the United States as a matter of course.

Such a special proceeding has been held equivalent to an independent summary suit in equity. (*Essgee v. United States*, 262 U. S. 151, 152-3; *United States v. Rosenwasser*, 145 Fed. [2d] 1015, 1017, C. C. A. 9.)

Hence, the decree made therein on February 18, 1948 (R. 85) was a final decree, and was appealable to the Circuit Court of Appeals under Section 225 of Title 28, U. S. C. A. (now Section 1291 of Title 28, U. S. C.).

To quote the *Rosenwasser* case just cited (p. 1016-7):

"Where no criminal action against him is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the court's order therein is appealable as a final decision. *Burdeau v. McDowell*, 1921, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 159; *Pertman v. United States*, 1918, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; *Cheng Wai v. United States*, 1942, 2 Cir. 125 F. 2d 915; *United States v. Poller*, 1930, 2 Cir., 43 F. 2d 911, 74 A. L. R. 1382."

4. It is also the universal holding that where, at the time when the application to suppress evidence or return papers is initiated, the criminal action for the purposes of which the evidence had been unconstitutionally seized, had not been begun or had been dismissed, such application is deemed an independent, separate proceeding equivalent to an independent suit in equity.

A final determination therein is appealable to the Circuit Court of Appeals.

Cogen v. United States, 278 U. S. 221, 225-6;

United States v. Byoir, 145 F. 2d 336, 337 (C. C. A. 5);

United States v. Rosenwasser, 145 F. 2d 1015, 1016-7 (C. C. A. 9);

In re Investigation by Attorney General, 104 F. 2d 658, 659 (C. C. A. 2);

United States v. Poller, 43 F. 2d 911, 912 (C. C. A. 2);

Dickhart v. United States, 16 F. 2d 345, 346, Court of Appeals, District of Columbia;

In re Brenner, 6 F. 2d 425 (C. C. A. 2).

To quote from the opinion in *Cogen v. United States*, 278 U. S. 221, *supra* (p. 225):

"The independent character of the summary proceedings is clear, * * * *wherever the motion, although entitled in the criminal case, is not filed until after the criminal prosecution has been disposed of*, as where under the National Prohibition Act a defendant seeks, after acquittal, to regain possession of liquor seized. And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court. This was true in *Essgee Co. v. United States*, 262 U. S. 151, *where the petition was entitled as a separate matter* and was referred to by the court as a special proceeding." (Italics ours.)

5. In granting the petition for the delivery of the photostats, the District Court rendered its decision on February 6, 1948. That decision was entitled (R. 81):

"In the Matter of Motions of Wallace & Tiernan Company, Inc., *et al.*, for the Return of Documents."

In that decision the District Court said as follows (R. 84):

"It seems to me that when the grand jury turned out to be illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment * * *.

"In *Johnson v. United States*, decided February 2, 1948 (16 L. W. 4133, 4135), the Supreme Court said:

"Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects," and would obliterate one of the most fundamental distinctions between our form of government; where officers are under the law, and the police-state where they are the law."

"It is my opinion that the Government, gaining access to the documents by means of an illegal grand jury, has no valid basis in law for the intrusion, which the Government committed in making the photostats of said documents and retaining possession of them."

A "decree" accordingly was entered on February 18, 1948 (R. 85): and the stay obtained by counsel for the Justice Department was terminated by order entered on April 20, 1948 (R. 86). The Department thereupon complied without appeal.

Thus, *here for the third time*, decisions of issues of law and fact became by the appellant's own course final, conclusive and *res judicata* between the same parties for all purposes, proceedings and actions; and the appellant *for a third time* even added to the finality in law finality in fact by its compliance.

Moreover, by command of Rule 41(e) of the Federal Rules of Criminal Procedure, the photostats were henceforth *not "admissible in evidence at any hearing or trial."* (Italics ours.)

6. At the foot of its opinion of February 6, 1948, the Court made the following notation (R. 85):

"Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment."

But this notation could not possibly change the facts, stated above, that the Indictment had already been dismissed *before* the petition for the delivery of the photostats was presented; and that the petition was in fact and in law an independent and separate proceeding which would and could not be converted into a non-existent something else by such a notation. (*Richfield Oil Corp. v. State Board*, 329 U. S. 67, 72; *Coastwise Lumber & Supply Co. v. United States*, 259 Fed. 847, 849, C. C. A. 2.)

7. The Department of Justice had no lawful right to circumvent the admittedly correct decree of March 19, 1947, for the immediate return of the subpoenaed papers by retaining photostatic copies thereof.

Moreover, there is not a syllable in the United States Constitution or in any statute which authorizes any such indirect means of transferring to the files of an agency or bureau of the Executive reproduction of a citizen's private papers and the permanent retention of them there.

The spirit of our Constitution and of our American Tradition cries out against such a desecration of private rights and liberties.

If the Department of Justice has the right to photostat private papers acquired without right and to retain the photostats, then we have the anomaly of a wrong becoming a right.

The settled law on this subject is thus succinctly stated in the first headnote to the decision of Judge Learned Hand in *United States v. Kraus*, 270 Fed. 578:

~~"When papers of parties subsequently indicted are seized upon an illegal search, the papers and all copies taken while the officers retained their illegal possession must be returned, and any information obtained therefrom must not be used at the trial or in its preparation."~~ (Italics ours.)

To the same effect are:

Essgee Co. of China v. United States, 262 U. S. 151, 156;

Silverthorne Lumber Co. v. United States, 251 U. S. 385;

Flagg v. United States, 233 Fed. 481, 486 (C. C. A. 2);

United States v. Brasley, 268 Fed. 59, 65;

United States v. Spallino, 21 F. (2d) 567, 568.

7. The prohibitions and consequent bar of the Fourth and Fifth Amendments operate as much in a civil case as in a criminal case. (*Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Rogers v. United States*, 97 F. (2d) 691, 692, C. C. A. 1; *Schenck v. Ward*, 24 F. Supp. 776; Rule 41c of the Federal Rules of Criminal Procedure.) (See the quotations from these decisions in Point VI, subd.

X. *past.*)

POINT VI

Furthermore, the decree of April 20, 1948, in Criminal Action 6070 (instituted by Information after the dismissal of the Indictment), suppressing any evidence obtained from the documents ordered by the aforesaid decrees to be delivered to the defendants, was correct in law, and also was given finality by its very nature and by Rule 41(e) of the Rules of Criminal Procedure for the District Courts of the United States.

The failure of the Justice Department to appeal therefrom constitutes a fourth instance of *res judicata*.

1. On May 1, 1947, after the dismissal of the purported "Indictment", the Attorney-General of the United States filed an Information under the Sherman Act in phraseology and subject matter identical with the Indictment and against the same parties. This Information was thereupon docketed as "Criminal Action Number 6070" (R. 272).

In that action, the defendants, on July 25, 1947, made a motion to dismiss the "Information", or, in the alternative, for (R. 87):

"An order precluding and restraining the United States from using *in any way or for any purpose* any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents." (Italics ours.)

The Motion was based on an affidavit (R. 89) and on the proceedings and decisions of the District Court discussed above (R. 90).

The grounds of the Motion were the violations of the Fourth and Fifth Amendments, the Government's failures to appeal from any of the foregoing decisions of the Dis-

trict Court, and the consequent finality thereof in law as *res judicata* and finality in fact by compliance (R. 35-4).

By opinion dated April 14, 1948, the District Court reviewed all the prior proceedings and the determinations made therein under the Fourth and Fifth Amendments of the Constitution of the United States; denied the motion to dismiss the Information, holding that evidence not constitutionally inhibited might be obtained "in support of the allegations in the information"; but granted the alternative relief by way of preclusion requested in paragraph 3 of the Notice of Motion (R. 91-95).

The ensuing decree of preclusion, entered April 20, 1948, was precisely in the above-quoted terms of the motion (R. 95, 96).

The Department of Justice expressly stated that it had "no objection" to the form of this decree (R. 114); recognized it to be "a final order" (R. 115); but never attempted to appeal from it. Indeed, the Department has never taken any further steps in the criminal action instituted by this "Information".

2. The appellant's brief (p. 33) cites some colloquy between the court and Mr. Kelleher, Special Assistant to the Attorney General, in which the Court stated in passing that it did not see how the entry of the decree "is going to prejudice you in some other case" (R. 126, 117, 119, 120). But the Court was careful to state, "I am not making any ruling" (R. 120), and that the appealability of the decree "isn't for this Court to say" (R. 121). The defendants' counsel expressly refused to make any concession on the subject (R. 118, 119).

In any event, the effect of a decree is not to be determined by preliminary colloquy but by the terms of the decree itself, especially when approved by the appellant as to form and recognized as "a final order" and not appealed (R. 114-5).

A

The preclusion decree of April 20, 1948, was in its scope and effect final as against the Government. The Government could have appealed therefrom.

1. Where the application to suppress is not restricted to the use of the evidence in some particular action, pending or about to be pending, but (to quote the opinion in the *Silverthorne* case) demands "that it shall not be used at all", a decree accordingly in such a proceeding is final as against the Government and appealable by it.

To quote the opinion of this Court in the *Cogen* case (*per* Mr. Justice Brandeis) (pp. 225-6):

"Where the proceeding is a plenary one, like the bill in equity in *Douling v. Collins*, 10 F. (2d) 62, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution.

* * * And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court."

In the present case, the application to preclude was not limited to the Information action but sought and obtained a decree of judicial outlawry, to use the phraseology of the appellant's brief (p. 35), "having scope beyond the particular proceeding in which it is entered".

2. Moreover, there is a plain distinction between the granting of such an application and its denial.

The granting of it is final as to the Government but the denial of it may not be final as to the defendant.

Concession of this distinction is thus made in the appellant's brief (p. 34):

"* * * the order granting the motion is in practical effect more final as to the Government than an order denying the motion would be as to appellees."

In the *Cogen* case, *supra*, the application was *denied*, with the consequent holding that the defendant could not appeal. The distinction between a denial and a grant was pointed out in the opinion (p. 224).

Hence, by its very nature, scope and consequence, the decree of April 20, 1948, went "beyond the particular proceeding in which it was entered", and was a final decree that the evidence "shall not be used at all" by the Government. (*Silverthorne* case, *supra*.) The Government could have appealed to the Circuit Court of Appeals for the First Circuit. Its failure to do so concludes it by *res judicata*.

B

Furthermore, the finality of the decree of April 20, 1948, as against the Government is conclusively confirmed by Rule 41(e) of the Rules of Criminal Procedure adopted for the very purpose of implementing the law as declared in the *Silverthorne* case, *supra*.

1. Rule 41 is entitled "Search and Seizure"; and paragraph (e) thereof is entitled "Motion for Return of Property and to Suppress Evidence."

This paragraph (e) provides, among other things, that where property "was illegally seized" in the name of law enforcement and a "motion" for its restoration and suppression of its "use as evidence" has been made and granted, "it (the property or the "evidence" supplied thereby) shall not be admissible in evidence at any hearing or trial." (Italics ours.)

As set forth in *United States v. Janitz*, 6 F. R. D. 1, 2 (appeal dismissed 161 F. (2d) 19), this Rule in its preliminary drafts provided that the evidence illegally secured "shall not be admissible in evidence at any hearing or trial of the proceeding in connection with which the seizure occurred."

The limitation italicized was finally eliminated. That elimination, as well as the comprehensive character of the language remaining, show conclusively that the order made on the motion provided for in that Rule is to be conclusive not only in the proceeding in which it was entered but "at any hearing or trial" where the inhibited evidence is offered.

2. This Rule implements the Fourth and Fifth Amendments to the Constitution of the United States according to the principles declared in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 391. It does so by operating *in rem* upon the property or evidence illegally seized or acquired. It designates a special "motion" "for the return of the property and to suppress for use as evidence anything so (illegally) obtained", as the appointed procedure for definitive determination of the issues as to illegality and suppression; and it renders the determination thereof applicable and effective "at any hearing or trial."

We need not stop to consider whether the theory of this Rule is the principle of an *in rem* proceeding, or is the principle of *res judicata*, or is the recognition of such a motion as an independent proceeding equivalent to "an independent suit in equity". (*United States v. Rosenwasser*, 145 Fed. [2] 1015, 1016-7 [C. C. A. 9]; *Essgee Co. v. United States*, 262 U. S. 151, 152-3; *Fowler v. Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10].) It is sufficient that, whatever the theory or theories of the Rule, the Rule's mandate and effect make the determination applicable

and conclusive "at any hearing or trial" wherever such issues may again arise.

3. In consequence, here for the fourth time, the plaintiff has allowed a decree of the District Court and the determinations of law implicit therein to become final and conclusive.

C

Aside from the conclusiveness of the decree of April 20, 1948, as *res judicata*, it was correct in law and essential to the effectiveness of the Fourth and Fifth Amendments.

Goldstein v. United States, 316 U. S. 114, 120;

Essgee Co. of China v. United States, 262 U. S. 131, 156;

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391-2;

Somer v. United States, 138 F. 2d 790, 791 (C. C. A. 2);

Rogers v. United States, 97 F. 2d 691, 692 (C. C. A. 1);

Flagg v. United States, 233 Fed. 481, 486 (C. C. A. 2);

Schenck v. Ward, 24 F. Supp. 776, 778.

1. The great landmark decision is *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

There, after an indictment of the corporation and several of its officers, representatives of the Department of Justice, acting under color of a grand jury subpoena *duces tecum* directed to the corporation for the production of its records forthwith, entered the corporation's office and, after serving the subpoena upon a representative there, carried off to the grand jury all the records

called for in the subpoena. Thereafter the Department conceded that by these acts the Fourth Amendment had been violated, and returned the seized records, but kept photostatic copies of material portions thereof. Later, a second indictment to the same effect was filed, and further grand jury subpoenas were issued for the production of limited and material portions of the same records. The Department claimed that, although it could not lawfully use the evidence obtained from the records in support of the first indictment, it could do so in support of the second, or a further indictment; and that the refusal of the defendant corporation to comply with the second subpoena was punishable contempt. This claim was overruled by this Court in an opinion (*per* Mr. Justice Holmes) saying (p. 392):

"In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 392. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (*Italics ours.*)

Another illustration is *Rogers v. United States*, 97 F. 2d 691 (C. C. A. 1), where the Department of Justice unsuccessfully claimed that the evidence seized by officers of the criminal law in violation of the Fourth Amendment could nevertheless be used by the Department against their owner in a *civil suit* by the United States. In rejecting this attempt, the Circuit Court of Appeals for the First Circuit said (p. 692):

"If a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the government in violation of the Fourth Amendment, we think that a judgment in a *civil cause*, in the

procurement of which evidence thus illegally obtained is used, is likewise rendered invalid." (Italics ours.)

2. The appellant's brief (p. 31) cites *Zap v. United States*, 328 U. S. 624, and *in re Sana Laboratories, Inc.*, 115 F.2d 717. Neither of these decisions has any bearing on the point for which they are cited.

In the *Zap* case, the defendant had agreed, in his contract for government business, to permit inspection of his accounts and records; and such an inspection was made during regular hours at the place of business. All that was held was that the defendant had thereby waived in advance any right to claim that the government's representatives came unlawfully on his premises and unlawfully looked at his records and by this means had possessed themselves of the information to which they testified at his trial.

The *Sana Laboratories* case presented the same situation. The defendant had, by the terms of his license for the manufacture of alcohol, agreed that his premises and business might be inspected during business hours by agents of the Treasury Department. The court held that whatever information was obtained by the agents during such an inspection was admissible.

In the latter case the court was careful to say that "knowledge gained by the Government's own wrong" is precluded (p. 718). That covers the instant case.

POINT VII

The principle of *res judicata* is as applicable to the decisions of a criminal court as to those of a civil court.

A final determination of an issue of law in either court is conclusive between the same parties in the other court.

The present civil complaint is a mere duplicate, on the civil side, of the Indictment and of the subsequent Information.

The charges and the wording in these three pleadings are identical, except where the respective techniques require technical differences (R. 9, 251, 272). These appellees are defendants named in all three.

Obviously, a civil action cannot be used as a medium for rearguing or appealing or annulling decrees and determinations made, consummated and performed in some other action or proceeding between the same parties. No such "collateral attack" is permissible. (*Fowler v. Hunter*, 164 F. 2d 668, 669 (C. C. A. 10); *Fowler v. Gill*, 156 F. 2d 565, 566 (D. C. App.).)

In other words, where an issue of law has been determined by a final decree in a criminal action and the Government has chosen not to appeal or has allowed the time to appeal to expire, the Government cannot indirectly reopen its time to appeal by raising the same issue of law in its companion civil action between the same parties. This for three reasons:

- (a) such an attempt would be an inadmissible collateral attack;
- (b) it would violate the principle of *res judicata*; and

(c) it would be an inadmissible attempt to secure a reargument and rehearing without regard to the rules of law governing such attempts.

Frank v. Mangum, 234 U. S. 309, 333;

United States v. Oppenheimer, 242 U. S. 85, 87;

Southern Pacific Railroad v. United States, 168

U. S. 1, 8;

Wilson v. United States, 166 F. 2d 527, 529;

Fowler v. Hunter, 164 F. 2d 668, 669 (C. C. A. 10);

Fowler v. Gill, 156 F. 2d 565, 566 (D. C. App.);

United States v. DeAngelo, 138 F. 2d, 466, 468-9

(C. C. A. 3);

United States v. Morse, 24 F. 2d 1001 (C. C. A. 2);

United States v. Meyerson, 24 F. 2d 855, 856

(C. C. A. 2);

United States v. Butler, 38 Fed. 498.

POINT VIII

By reason of the foregoing, the Court below correctly denied the motions made, and vacated the subpoenas issued, by the appellant in this civil action in April and May, 1948.

The three motions which the Justice Department made in this civil action in April, 1948, all ran *solely* to about 8,000 documents (property of the defendants) which had been photostated by the plaintiff during the illegal but so-called Grand Jury Investigation, and to the photostats thereof ordered returned by the decree of February 18, 1948 (R. 34, 36, 44, 46, 50, 230). (See also appellant's brief, pp. 9, 10.)

These motions in this civil action were entitled:

- (1) "Motion to vacate order on motion for return of photostat copies of documents" (R. 34-6);

(2) "Motion for production of documents under Rule 34" (R. 36);

(3) "Motion for production of photostatic copies of documents surrendered by plaintiff" (R. 46).

So, likewise, the subpoenas *duces tecum* in this civil action served by the Department of Justice in May, 1948, ran *solely* to the same documents photostated by the Department as aforesaid (appellant's brief, p. 10; and R. 136-181). The defendants moved to quash these subpoenas (R. 182-192).

At the hearing on these motions on May 3, 1948, Mr. Kelleher, Special Assistant to the Attorney General, stated as follows the substance of the motions and of the Department's claim concerning them (R. 302-3):

"In substance, if it please the Court, these motions seek to obtain for use in the civil action the documentary evidence which has been the subject of previous orders of this Court in the criminal case.

* * * So that before your Honor this morning are two issues presented by these motions. First: May the Government obtain for use in the civil case the photostatic copies of documents surrendered last week? And, secondly: May the Government obtain for use in the civil case, that is, may the Government inspect and make copies of the documentary evidence from which the photostatic copies were made? * * *

The basic issue, of course your Honor, this morning is the question of whether the Government, in the light of the history of these documents in the criminal case, is entitled to obtain the documents for use in the civil case."

Thus, obviously and avowedly, the appellant's aforesaid three motions, plus its aforesaid subpoenas *duces tecum*, were merely attempts in this civil action to re-

argue, appeal, re-call and annul the aforesaid determinations and decrees on the identical subject matter, allegations and issues, which have been made in the prior proceedings between the same parties and to which the plaintiff had given finality in fact and in law by compliance and failure to appeal.

Obviously also, the District Court was right in the concluding statement in its opinion of May 26, 1948, that (R. 303-4):

"It seems to me that these motions are an attempt on the part of the Government to *reargue* in this civil action matters which have been decided in the criminal case and from which the Government did not appeal."
(Italics ours.)

For all the reasons in the preceding Points hereof the District Court was right in rejecting these moves by the appellant; and, moreover, the appellant was so concluded by its previous course that it had no standing to make them.

POINT IX

The claim at the end of the appellant's brief that the "dismissal of the indictment was more than adequate to compensate appellees for any possible wrong to them" contradicts the reality.

1. On page 48 the appellant's brief says:

"Furthermore, the appellees have already been granted redress for the one element of wrongfulness which the District Court found, the technical defect in the manner of impanelling the grand jury"

Again on page 49 the appellant's brief says:

Under all these circumstances, the remedy of dismissal of the indictment was more than adequate to compensate appellees for any possible wrong to them resulting from the failure to include women in the panel of grand jurors."

The fact that the Department promptly substituted for the dismissed Indictment, a Criminal Information by itself in the same identical terms, with the same identical changes, and against the same identical parties, gives a sound of hollow mockery to the above quotations.

The appellant's brief and the statements of its spokesmen in the District Court are full of concessions that both the Indictment, the Information and the complaint in this civil action were based upon the documents which, through the instrumentality of this illegal grand jury, the Justice Department compelled the defendants to produce for its inspection and use (R. 205 *et seq.*).

The prejudice to the defendants is self-evident. Their private papers have been seized and searched in reality by the Justice Department through the instrumentality of the so-called "grand jury" and have been used by the Department as a basis of two criminal proceedings and a civil action against these defendants.

2. Moreover, the claim in the appellant's brief (p. 49) that "the appellees could show no prejudice from the exclusion of women," has been flatly held to be irrelevant. (*Ballard v. United States*, 329 U. S. 187, 195.)

3. But, aside from the consideration of "prejudice", gross and deliberate, the violation of basic constitutional guarantees can never be brushed aside by the guardians of the Constitution on the theory of being "technical defects" comparable to mere irregularity in court procedure.

The whole struggle for the preservation of constitutional freedom is a history of watchful resistance to so-called "slight" encroachments used as merely "technical defects."

In *McNabb v. United States*, 318 U. S. 332, this Court said (per Mr. Justice Frankfurter) (p. 347):

"The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

In his noted dissenting opinion in *Olmstead v. United States*, 277 U. S. 438, Mr. Justice Brandeis said (pp. 478-9):

"They (the makers of our Constitution) conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

The plea *ad misericordiam* at the close of the appellant's brief has no place in the law.

As this Court said in *Hale v. Henkel*, 201 U. S. 43, 68:

"The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony."

POINT X

The rulings by the District Court at the so-called "trial" which the Justice Department conducted on June 2, 1948, were correct.

1. When the case was called on the trial calendar on June 2, 1948, Mr. Tuttle, counsel for the defense, demanded to know whether the plaintiff was intending to conduct a trial "in the usual sense of the word," contrary to its past assurances that it did not so intend. He stated that, otherwise, the defendants would want several months for preparation (R. 203-5).

The plaintiff's past assurances were thereupon quoted by Mr. Tuttle (R. 203-4). Briefly, they were these:

At the court hearing on May 24, 1948, in discussing the plaintiff's attitude if the case were called up for trial, its counsel said (R. 198, 203):

"Mr. Kelleher: I wish to assure counsel and the Court that in view of the rulings of the Court announced today, *the Government does not intend to offer evidence* if a date (for trial) is granted as we have requested." (Italics ours.)

Accordingly, when, at the opening of the so-called "trial" on June 2, 1948, the defense counsel quoted the foregoing assurances on May 24, 1948, by the plaintiff's counsel, the latter again said that he was not asking for and would not conduct a trial "in the usual sense of the word" (R. 204).

The plaintiff's counsel then followed this assurance with the further assurance to the defense that it need do nothing at all in connection with the proceedings which the plaintiff was about to take and that the defendants

would not be prejudiced thereby. To quote the plaintiff's counsel (R. 204):

"Mr. Kelleher: I think it will become clear as we proceed this afternoon that the defendants will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time."

In accenting this assurance, the plaintiff's counsel further said (R. 205):

"Mr. Kelleher: I can assure counsel they are perfectly prepared for what we are going to do this afternoon and if anything comes up and you wish a continuance, we will consent to it. I am perfectly certain you will not need it and will not request it."

2. In this so-called trial which the Justice Department then conducted, its spokesman, Mr. Kelleher, made an "Opening Statement" in which he said (R. 206-7):

"Although the Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. . . ."

For the foregoing reasons, if the Court refuses to receive the subpoenaed documents in evidence or to take testimony as to their contents, the Government does not intend to offer any other evidence in its case."

The court below, in its decision now under appeal, quoted the above from the "Opening Statement" by Mr. Kelleher (R. 233).

In line with this "Opening Statement", Mr. Kelleher said that he "would like to file with the Court an affidavit by me" (R. 214), which he was "not treating as evidence being given under oath" (R. 215), but which "assumes as the background the record thus far made in this court" (R. 215). Defense counsel objected to the filing or receipt of the affidavit for any purpose (R. 214-8); but the Court admitted it as "nothing more" than a statement of Mr. Kelleher's plan (R. 218).

This affidavit by Mr. Kelleher repeated in substance what he had said in his "Opening Statement," and concluded (R. 231-2):

"Furthermore, the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged **by the complaint** and *although conceivably such evidence might be obtained, that could only be done after an investigation coextensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents*" (Italics ours.)

It was to these words in Mr. Kelleher's "Opening Statement" and in his affidavit that the District Court doubtless alluded in its decision of August 6, 1948, when it found that: "The reality here practically amounts to non-prosecution," since the Government conceded that other evidence "might be obtained" but that it preferred to leave the case "in its present posture" (R. 241).

3. The only other step taken by the plaintiff's counsel at this so-called "trial" was the rather unique one of calling his associate counsel, Mr. Alfred Karsted, as a "witness" (R. 210), and asking him whether, in the course of his participation in the investigation by the "Special Grand Jury" (which the plaintiff had already conceded to have been rightly held by the Court to be an illegal body,

R. 102), he had examined certain documents which the plaintiff's counsel admitted to be among those ordered by the Court to be returned to the defendants (R. 210-3).

Defense counsel objected to this questioning on the grounds that it was an improper effort to elicit hearsay and secondary evidence as to the contents of written documents; that it was an improper effort to make use of information contained in documents which had been illegally and unconstitutionally seized and used by the illegal grand jury and the Department of Justice; and that the proposed testimony would be immaterial, irrelevant and incompetent (R. 210-3). The Court thereupon sustained the objection. Thereupon the plaintiff's counsel stated that he had "no further questions" (R. 213). Since there was no cross-examination, the so-called "witness" (Mr. Karsted) left the stand (R. 213).

4. The plaintiff's counsel then followed the foregoing illusion of a trial with the announcement that "the plaintiff rests" (R. 219); and defense counsel rejoined: "Your Honor, I cannot conceive what I am called upon to say or do" (R. 219).

Notwithstanding that he had not presented any evidence (least of all, proved anything), the plaintiff's counsel then achieved a record in extraordinary and artificial applications in court, by saying (R. 220):

"Mr. Kelleher: I urge Your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint."

Plaintiff's counsel then heightened the transparent artificiality of this application by refusing the Court's request for a statement of the "grounds" for so unheard-of a proposal (R. 220-1, 223), and summed up his position by this extraordinary invitation to the Court (R. 221, 223):

"Mr. Kelleher: *I am asking Your Honor to dispose of the case.* * * * All I ask your Honor is to rule." (Italics ours.)

5. The plaintiff's counsel then wound up the rather humorous day by stating that he was making a "summation", which he rhetorically concluded by saying (R. 227): "Your Honor, I request judgment for the plaintiff." Quite understandably the astonished District Court exclaimed (R. 221):

"The Court: I never heard of such a thing, of a Court being asked to do something that was not based upon evidence."

To Mr. Kelleher's "request" for judgment for the plaintiff the defense counsel and the Court rejoined as follows (R. 227-8):

"Mr. Tuttle: We are not resting the case in the sense that there is a prosecution which has been proved or as to which evidence has been presented. We are simply saying that we regard this as non-prosecution and that we are not—

The Court: To be frank with you, gentlemen, that is what it appears to the Court at the moment. Whether I am right or not in that, I don't know, but I am going to take time to find out whether or not the Court has a right to dismiss this because of the record."

Briefs were thereupon submitted and the decision expressed in the Court's opinion of August 6, 1948, and its judgment of September 3, 1948, followed (R. 232, 376).

Its decision granted the very form of judgment which, at the hearing of May 24, 1948, Mr. Kelleher had suggested, to wit: a judgment without prejudice against the Government (R. 198).

CONCLUSION

In the event that jurisdiction is accepted and the appeal is not dismissed, the judgment should be affirmed.

Dated March 22, 1949.

Respectfully submitted,

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